"The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation"

By John Felemegas, B.A., LL.B., LL.M.

Thesis submitted to the University of Nottingham
for the degree of Doctor of Philosophy, June 2000

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ABSTRACT

The United Nations Convention on Contracts for the International Sale of Goods, 1980 ("CISG") creates a uniform law for the international sale of goods. However, textual uniformity is a necessary but insufficient step towards achieving substantive legal uniformity, since the formulation and enactment of a uniform legal text carries no guarantee of its subsequent uniform application in practice. This thesis therefore considers different approaches to the interpretation of CISG and evaluates their appropriateness for uniform international trade law, before advancing an interpretative approach based on the concept of internationality and generally acknowledged principles of commercial law, such as the UNIDROIT Principles.

The analysis offered by the present writer is based on the examination of the nature, scope and function of Article 7 CISG, which expressly prescribes the direction that CISG's interpretation and application should follow and whose own interpretation will determine, to a large degree, the ultimate fate of CISG as a truly uniform code. Owing to its unique nature and limitations, it is necessary that CISG exist on top of a legal order that can provide doctrinal support and solutions to practical problems – such as gap-filling – in order to guarantee CISG's functional continuity and development without offending its values of internationality, uniformity and good faith, as expressed in Article 7(1) CISG and analysed in this thesis.

It is the opinion of the present writer that CISG is, and must remain, a self-contained body of rules, independent of and distinct from the different domestic laws.

Supported by analysis of the existing doctrine, as well as by case law, this thesis argues that the necessary legal backdrop for CISG's existence and application can be provided by general principles of international commercial law, such as those exemplified by the UNIDROIT Principles, which will, if adopted, render the textual reference in Article 7(2) CISG to private international law redundant – a positive step towards uniformity. The recourse to rules of private international law in the interpretation of CISG, even as a last resort, would represent regression into doctrinal fragmentation and practical uncertainty. The relevant textual reference in Article 7(2) CISG to such a method is the regrettable result of diplomatic drafting compromises and should remain inactive, since its activation would reverse the progress achieved by the world wide adoption of CISG as a uniform body of international sales law.

CHAPTER 1

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UNIFORM INTERNATIONAL SALES LAW: FROM LEX MERCATORIA TO CISG

1. INTRODUCTION

The United Nations Convention on Contracts for the International Sale of Goods 1980 ("CISG")[1] and the process by which it was created, by the United Nations Commission on International Trade Law (UNCITRAL), and adopted, during a Diplomatic Conference in Vienna attended by experts from all parts of the world, established the benchmark for the unification of commercial law in the post-war era.[2] The development of CISG by UNCITRAL managed to dodge the regional and political confrontations and bloc politics common in U.N. bodies, to the lasting benefit of those engaged in harmonisation of law. The CISG, completed in 1980, which drew substantially on UNCITRAL's first multi-lateral treaty on limitation (prescription) periods, as well as prior treaty regimes worked out at UNIDROIT, essentially merged civil and common law precepts in an area of long standing domestic law in all countries. CISG prescribes the uniform law for the international sale of goods.

The CISG came into force in 1988 when eleven States together deposited their instruments of ratification.[3] It has not only drawn an impressively large number of States to join its regime,[4] but also spawned the important CLOUT system of standardised reporting of national decisions through the U.N. The latter has set the groundwork for the reality of a future internationalisation of legal results.

The existence of CISG evidences that the international process could indeed produce rules of substantive law, notwithstanding the traditional wisdom that this was largely unachievable, citing the limited reach both of the CISG's treaty predecessors in the

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[1] United Nations Conference on Contracts for the International Sale of Goods, Final Act (Apr. 11, 1980), U.N. Doc. A/Conf. 97/18 (1980), *reprinted in* S. Treaty Doc. No. 98-9 (1983), 98th Cong., 1st Sess., and 19 I.L.M. (1980) 668 [hereinafter "CISG", or "Vienna Sales Convention"]. The text of CISG is also available at the official UNICTRAL website on the internet, at www.uncitral.org .

[2] In the period from 1945 to 1970, cross-border harmonisation of private law was primarily effective in the areas of international transportation and dispute resolution, the latter resulting in the Hague Conventions on service of process and evidence and the U.N. Convention on foreign arbitral awards ("New York Convention").

[3] The original eleven States were: Argentina, China, Egypt, France, Hungary, Italy, Lesotho, Syria, United States, Yugoslavia and Zambia.

[4] *See* CISG Contracting States and Declarations Table, 17 *Journal of Law & Commerce* (1998) 449. For the updated list of membership, *see* the Pace Law School website, at www.cisg.law.pace.edu .

European community and the Bustamente Code in the Americas. This achievement set in motion a number of efforts in various international fora, and will probably continue to do so if the efforts of UNCITRAL are any indication. Because of its nature, uniform international commercial law presents special challenges to those who interpret it. As stated in its Preamble, CISG was created "to remove legal barriers in international trade and promote the development of international trade". The CISG is an important document, since it establishes a comprehensive code of legal rules governing the formation of contracts for the international sale of goods, the obligations of the buyer and seller, remedies for breach of contract and other aspects of the contract. To accomplish its objectives it is essential to interpret it properly. The unification of the law on international sales calls for its common interpretation by different legal systems. Article 7 CISG is the provision which sets the standards and whose own interpretation will determine, to a large degree, the ultimate fate of CISG as a truly uniform code. The development and meaning of Article 7 CISG, the article entrusted with providing the direction that CISG's interpretation and application should follow, is the subject of this work.

In order to obtain a deeper understanding of the nature and scope of CISG, it is essential to understand the nature and purpose of its founding body, UNCITRAL. Such an analysis will provide, according to the present writer, not only the relevant context of CISG's birth and development in a brave new world of uniform international trade laws, but also the proper direction for its interpretation and application.

Origin, mandate and composition of UNCITRAL

The United Nations Commission on International Trade Law (UNCITRAL) was established by the General Assembly of the United Nations in 1966.[5] In establishing the Commission, the General Assembly recognised that disparities in national laws governing international trade created obstacles to the flow of trade, and it regarded UNCITRAL as the vehicle by which the United Nations could play a more active role in reducing or removing these obstacles.[6]

The General Assembly gave the Commission the general mandate to further the progressive harmonisation and unification of the law of international trade. UNCITRAL has since come to be the core legal body of the United Nations system

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[5] Resolution 2205 (XXI) of 17 December 1966.

[6] The official website of UNCITRAL is www.uncitral.org .

in the field of international trade law,[7] with truly universal membership specialising in law reform worldwide for over 30 years. Its creation is seen as the legal response to the globalisation of international trade and its goal is the progressive harmonisation of the law of international trade.[8] The Commission is composed of thirty-six member States elected by the General Assembly. Membership is structured so as to be representative of the world's various geographic regions and its principal economic and legal systems. Members of the Commission are elected for terms of six years, the terms of half the members expiring every three years.[9]

UNCITRAL's projects include the drafting of worldwide acceptable Conventions, model laws and rules, the publishing of legal and legislative guides and recommendations, the procurement of updated information on case law and enactments of uniform commercial law and the provision of technical assistance in law reform projects and regional and national seminars on uniform commercial law. The fields of UNCITRAL's operation include Sale of Goods, Arbitration, Electronic Commerce, Procurement, Negotiable Instruments, Project Finance, Insolvency, Countertrade, Construction Contracts, Guarantees, Receivables Financing, Letters of Credit and Maritime Transport.

The methods and work of UNCITRAL

The Commission has established three working groups to perform the substantive preparatory work on topics within the Commission's programme of work. Each of the working groups is composed of all member States of the Commission.

The Commission carries out its work at annual sessions, which are held in alternate years at United Nations Headquarters in New York and at the Vienna International

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[7] The Secretariat of UNCITRAL is the International Trade Law Branch of the United Nations Office of Legal Affairs. It is located at Vienna, and can be contacted at: {PRIVATE}UNCITRAL Secretariat, P.O. Box 500, Vienna International Centre, A-1400 Vienna, Austria; Telephone: (43-1) 26060-4060 or 4061; Telefax: (43-1) 26060-5813; Internet home page: http://www.un.or.at/uncitral ; E-mail address: uncitral@unvienna.un.or.at .

[8] The motto "ONE WORLD OF COMMERCE: towards ONE COMMERCIAL LAW" occupies a prime position in UNCITRAL's website at www.uncitral.org

[9] As from 1 June 1998, the members of UNCITRAL, and the years when their memberships expire, are:
Algeria (2001), Argentina (2004 - alternating annually with Uruguay, starting in 1998), Australia (2001), Austria (2004), Botswana (2001), Brazil (2001), Bulgaria (2001), Burkina Faso (2004), Cameroon (2001), China (2001), Colombia (2004), Egypt (2001), Fiji (2004), Finland (2001), France (2001), Germany (2001), Honduras (2004), Hungary (2004), India (2004), Iran (Islamic Republic of) (2004), Italy (2004), Japan (2001), Kenya (2004), Lithuania (2004), Mexico (2001), Nigeria (2001), Paraguay (2004). Romania (2004), Russian Federation (2001), Singapore (2001), Spain (2004), Sudan (2004), Thailand (2004), Uganda (2004), United Kingdom of Great Britain and Northern Ireland (2001), United States of America (2004), and Uruguay (2004 - alternating annually with Argentina, starting in 1999).

Centre. Each working group of the Commission typically holds one or two sessions a year, depending on the subject-matter to be covered; these sessions also alternate between New York and Vienna.

In addition to member States, all States that are not members of the Commission, as well as interested international organisations, are invited to attend sessions of the Commission and of its working groups as observers. Observers are permitted to participate in discussions at sessions of UNCITRAL and its working groups to the same extent as members.[10]

The areas in which the Commission has worked or is working and the major results of that work are:

A. International sale of goods and related transactions

- Convention on the Limitation Period in the International Sale of Goods (New York, 1974).[11]
- United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980).[12]
- UNCITRAL Legal Guide on International Countertrade Transactions.[13]

B. International transport of goods

- United Nations Convention on the Carriage of Goods by Sea, 1978 (the "Hamburg Rules").[14]

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[10] Documents submitted to the Commission and its working groups are published in the six official languages of the United Nations (Arabic, Chinese, English, French, Russian and Spanish). They bear the symbol A/CN.9/... The more recent documents, which have not yet been reproduced in a Yearbook, are available on request from the UNCITRAL Secretariat at Vienna. The UNCITRAL Yearbook is published with a delay of one or two years. The UNCITRAL Yearbook is a compilation of all substantive documents related to the work of the Commission and its Working Groups. It also reproduces the annual Report of the Commission, which is published as Supplement No. 17 of the "Official Records of the General Assembly". The Yearbook is published in English, French, Russian and Spanish and is available in the libraries that function as the United Nations Depository Libraries. Such libraries exist in national capitals and in a number of other major or university cities.

[11] This Convention establishes uniform rules governing the period of time within which legal proceedings arising from an international sale contract must be commenced. It has been amended by a Protocol adopted in 1980 when the United Nations Sales Convention was adopted. Both the original Convention and the Convention as amended entered into force on 1 August 1988.

[12] This Convention, which is the subject matter of the present writer's thesis, establishes a comprehensive code of legal rules governing the formation of contracts for the international sale of goods, the obligations of the buyer and seller, remedies for breach of contract and other aspects of the contract. The Convention entered into force on 1 January 1988.

[13] The purpose of the Legal Guide, adopted in 1992, is to assist parties negotiating international countertrade transactions. It identifies legal issues involved in such transactions and discusses possible contractual solutions.

[14] This Convention establishes a uniform legal regime governing the rights and obligations of shippers, carriers and consignees under a contract of carriage of goods by sea. It was prepared at the request of developing countries and its adoption by States has been endorsed by such

- United Nations Convention on the Liability of Operators of Transport Terminals in International Trade.[15]

C. International commercial arbitration and conciliation

- UNCITRAL Arbitration Rules.[16]
- Recommendations to assist arbitral tribunals and other interested bodies with regard to arbitrations under the UNCITRAL Arbitration Rules (1982).
- UNCITRAL Conciliation Rules (1980).[17]
- UNCITRAL Model Law on International Commercial Arbitration (1985).[18]
- UNCITRAL Notes on Organizing Arbitral Proceedings (1996).[19]
- Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).[20]

D. Public Procurement

- UNCITRAL Model Law on Procurement of Goods, Construction and Services (1994).[21]

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intergovernmental organizations as UNCTAD, Asian-African Legal Consultative Committee and the Organisation of American States. The Convention entered into force on 1 November 1992.

[15] This Convention sets forth uniform legal rules governing the liability of a terminal operator for loss of and damage to goods involved in international transport while they are in a transport terminal, and for delay by the terminal operator in delivering the goods. The draft Convention was adopted by a diplomatic conference and opened for signature, ratification and accession on 19 April 1991. The Convention will enter into force upon the deposit of 5 instruments of ratification, acceptance, approval or accession.

[16] Adopted in 1976, the UNCITRAL Arbitration Rules provide a comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings arising out of their commercial relationship. The Rules are widely used in *ad hoc* arbitrations, as well as in administered arbitrations.

[17] When parties to a commercial dispute wish to settle their disputes amicably through conciliation, they may agree upon this set of procedural rules to govern the conciliation proceedings.

[18] The UNCITRAL Model Law is designed to assist States in reforming and modernising their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration. It was adopted by UNCITRAL in 1985 and has been enacted into law by a large number of jurisdictions from both developed and developing countries.

[19] The Notes are designed to assist arbitration practitioners by providing an annotated list of matters on which the arbitral tribunal may wish to formulate decisions during the course of arbitral proceedings. The text, which is in no way binding, may be used whether or not the arbitration is administered by an arbitral institution.

[20] Although the Convention was prepared by the United Nations prior to the existence of UNCITRAL, promotion of the Convention is an integral part of the Commission's programme of work. As its name indicates, it provides for the recognition and enforcement of arbitral awards rendered in foreign countries.

[21] The UNCITRAL Model Law, adopted by the Commission in 1994, is designed to assist States in reforming and modernising their laws on procurement procedures. The Model Law contains procedures aimed at achieving the objectives of competition, transparency, fairness and objectivity in the procurement process, and thereby increasing economy and efficiency in procurement. In order to assist executive branches of Governments, parliaments and legislatures using the Model Law, the Commission has produced a *Guide to Enactment of the UNCITRAL Model Law on Procurement of Goods, Construction and Services*.

- In 1993, the Commission had adopted the UNCITRAL Model Law on Procurement of Goods and Construction together with an accompanying Guide to Enactment.[22]

E. Construction Contracts

- UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works.[23]

F. International Payments

- United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988).[24]
- UNCITRAL Legal Guide on Electronic Funds Transfers.[25]
- UNCITRAL Model Law on International Credit Transfers (1992).[26]
- United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995).[27]

G. Electronic commerce

- Recommendation on the Legal Value of Computer Records (1985).
- UNCITRAL Model Law on Electronic Commerce.[28]

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[22] This Model Law is available for use by States who wish to enact procurement legislation with a scope limited to procurement of goods and construction.

[23] The Legal Guide was published in February 1988 and is available in all six United Nations official languages. It discusses the many legal issues that arise in connection with the construction of industrial works, covering the pre-contractual, construction and post-construction phases, and suggests possible ways in which the parties may deal with these issues in their contracts. It was prepared with the special problems of buyers from developing countries in mind.

[24] This Convention provides a comprehensive code of legal rules governing new international instruments for optional use by parties to international commercial transactions. It is designed to overcome the major disparities and uncertainties that currently exist in relation to instruments used for international payments. The Convention applies if the parties use a particular form of a negotiable instrument indicating that the instrument is subject to the UNCITRAL Convention. The Convention was adopted and opened for signature by the General Assembly at its 43rd session in December 1988. A minimum of 10 ratifications or accessions are necessary for the Convention to come into force.

[25] The Legal Guide, which was published in 1987, identifies the legal issues arising from the transfer of funds by electronic means and discusses possible approaches for dealing with those issues.

[26] The Model Law, adopted in 1992, deals with operations beginning with an instruction by an originator to a bank to place at the disposal of a beneficiary a specified amount of money. It covers such matters as the obligations of a sender of the instruction and of a receiving bank, time of payment of a receiving bank and liability of a bank to its sender or to the originator when the transfer is delayed or other error occurs.

[27] The Convention was adopted by the General Assembly on 11 December 1995. It is designed to facilitate the use of independent guarantees and stand-by letters of credit, in particular where only one or the other of those instruments may be traditionally in use. The Convention also solidifies recognition of common basic principles and characteristics shared by the independent guarantee and the stand-by letter of credit. The Convention has been adhered to by the requisite 5 States and will therefore enter into force on 1 January 2000.

[28] The Model Law, adopted in 1996, is intended to facilitate the use of modern means of communications and storage of information, such as electronic data interchange (EDI), electronic mail and telecopy, with or without the use of such support as the Internet. It is based on the establishment

H. Cross-Border Insolvency

- UNCITRAL Model Law on Cross-Border Insolvency.[29]

I. Other products of work of UNCITRAL

Other products of the work of UNCITRAL include:

- Provisions on a universal unit of account and on adjustment of the limit of liability in international transport conventions (1982);
- Uniform Rules on Contract Clauses for an Agreed Sum Due upon Failure of Performance (1983).
- Case Law on UNCITRAL Texts (CLOUT)

The UNCITRAL Secretariat has established a system for collecting and disseminating information on court decisions and arbitral awards relating to the Conventions and Model Laws that have emanated from the work of the Commission. The purpose of the system is to promote international awareness of the legal texts formulated by the Commission and to facilitate uniform interpretation and application of those texts.[30] The importance of the system to CISG's interpretation is highlighted in subsequent chapters of this work.[31]

Final remarks

Even a cursory examination of UNCITRAL's efforts, such as the one above, reveals the renewed vigour with which the problem of unification of international trade law is being tackled and the importance that is placed upon that task.

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of a functional equivalent for paper-based concepts such as "writing", "signature" and "original". By providing standards by which the legal value of electronic messages can be assessed, the Model Law should play a significant role in enhancing the use of paperless communication. In addition to general norms, the Model Law also contains rules for electronic commerce in specific areas, such as carriage of goods. With a view to assisting executive branches of Governments, legislative bodies and courts in enacting and interpreting the Model Law, the Commission has produced a *Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce*.

[29] The purpose of the Model Law, adopted in 1997, is to promote modern and fair legislation for cases where the insolvent debtor has assets in more than one State. The text deals with conditions under which the person administering a foreign insolvency proceeding has access to the courts of the State that has enacted the Model Law, determines conditions for recognition of a foreign insolvency proceeding and for granting relief to the representative of such foreign proceeding, permits courts and insolvency administrators from different countries to co-operate more effectively, and contains provisions on co-ordination of insolvency proceedings that take place concurrently in different States. A *Guide to Enactment* (A/CN.9/442) was published with a view to assisting Governments in preparing legislation based on the Model Law.

[30] The system is explained in document A/CN.9/SER.C/GUIDE/1, available from the Secretariat. Currently, CLOUT covers the Convention on the Limitation Period in the International Sale of Goods (New York, 1974), as amended by the Protocol of 1980, the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980). the UNCITRAL Model Law on International Commercial Arbitration (1985) and the Hamburg Rules.

[31] *See*, especially, Chapters 3, 4 and 5 of this thesis, *infra*.

Although the task is not new, it probably has its best chance of success today, due to its temporal and contextual placement within the recent burst of unifying legislative activity at the international level. More specifically, international sales law has been around a lot longer than any of the bodies that are attempting to codify it.
Furthermore, the idea of a unified international trade law is not novel. In fact it is a revival of an ancient trend towards unification which can be traced to the Middle Ages and which had given rise to the "law merchant". Modern unifying attempts in this field also pre-date CISG, which is the latest (and probably the last) modern endeavour. In effect, although CISG represents the new face of international sales law, its genealogy is a particularly long and informative one. Long because it dates to ancient times of flourishing trade in the then known world and informative because it reveals the intrinsic legal problems of international trade. In order to understand the need for modern uniform law and, further, evaluate its prospects for success or failure, it is necessary to outline the evolution of this trend from its ancient predecessors to its modern shape and form.
As such, a historical account of the development of international trade law, from the time of the old *lex mercatoria* through to the new *lex mercatoria* and the evolution of CISG is not only unavoidable but also necessary.

2. UNIFICATION OF INTERNATIONAL SALES LAW

Commercial law is largely concerned with international trade. The existence of different legal systems around the world acts as a hindrance to the smooth operation of international trade, as the diversity of national laws produces conflict and legal uncertainty. Consistency and certainty in the law are not merely an indulgence for the benefit of lawyers; they are essential elements to parties attempting to enter into a contractual agreement.
There is little empirical research into the extent to which contract law plays a role in the commercial decision making process. What evidence there is suggests that business people are prone to make contracts and to solve contractual disputes without reference or with minimal reference to the applicable legal principles.[32] There are various reasons for this:

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[32] *See, e.g.*, L.M.Freedman and S.Macaulay, "Contract Law and Contract Teaching: Past, Present and Future" [1967] *Wisconsin Law Rev* 805; S.Macaulay, "Non-Contractual Relations in Business", 28

- legal formality and explicitness can be unwelcome burdens in modern contracting and insistence on them can suggest distrust among parties, as well as prejudice future transactions between them;
- general distrust and suspicion towards lawyers and litigation which could make public business facts that businessmen like kept private;
- the potential damage that litigation can affect on the parties' commercial reputation;
- ignorance, which can be explained on the degree of complexity that modern contract law has acquired.

There is no suggestion that contract law should be abandoned because business people would prefer not to engage in meticulous legal planning of their dealings. However, a strong argument can be made for making commercial law simpler and more accessible – and its application less expensive once a dispute between contracting parties has arisen. Choice of law clauses are usually inserted in most contracts, but they can only act as a "partial conflict avoidance device".[33] From a businessman's point of view conflict avoidance is far better than conflict solution. It is by adopting an autonomous and uniform legal regime for all international transactions, irrespective of the *locus in quo*, that legal predictability and security can be achieved and the problems created by diverse national laws can be overcome with a greater degree of certainty.[34] It follows that only a uniform law can act as a "total conflict avoidance device".[35]

Since the beginning of this century[36] efforts have been made to overcome the nationality of commercial law, which originated from the emergence of national States in Europe and from the enactment of the first codes.[37]

Lord Justice Kennedy wrote extra-judicially in 1909:

Am. Soc. Rev. (1963) 55; H.Beale and T.Dugdale, "Contracts between Businessmen; Planning and the Use of Contractual Remedies" 2 *Brit. J of Law & Soc.* (1975) 18; S.Macaulay, "Elegant Models, Empirical Pictures and the Complexities of Contract", 11 *Law and Society Rev.* (1977) 507.

[33] C.M.Schmitthoff, "Conflict Avoidance in Practice and Theory in the Preventative Law of Conflicts", 21 *Law and Contemporary Problems* (1956) 429, at 454.

[34] *See* K.Zweigert and H.Kotz, *An Introduction to Comparative Law* (trans. T.Weir), (North-Holland, 1977), Vol. I, 30.

[35] Schmitthoff, *supra* note 33, at 432.

[36] *See* R.B.Schlesinger, *Comparative Law* (5th ed., 1987), 31.

[37] On the effect of the enactment of the first codes in Europe, *see* R.David and J.Brierley, *Major Legal Systems in the World Today* (3rd ed., 1985), where the authors state that "codes were treated, not as new expositions of the 'common law of Europe', but as mere generalisations of 'particular customs' raised to a national level...[T]hey were regarded as instruments of a nationalisation of law." *Ibid.*, at 66.

> "The certainty of enormous gain to civilised mankind from the unification of law needs no exposition. Conceive the security and the peace of mind of the ship-owner, the banker, or the merchant who knows that in regard to his transactions in a foreign country the law of contract, of moveable property, and of civil wrongs is practically identical with that of his own country ... But I do not think that the advocate of the unification of law is obligated to rely sole upon such material considerations, important as they are. The resulting moral gain would be considerable. A common forum is an instrument for the peaceful settlement of disputes which might otherwise breed animosity and violence [i]f the individuals who compose each civilised nation were by the unification of law provided, in regard to their private differences or disputes abroad with individuals of any other nation, not indeed with a common forum (for that is an impossibility), but with a common system of justice in every forum, administered upon practically identical principles, a neighbourly feeling, a sincere sentiment of human solidarity (if I may be allowed the phrase) would thereby gradually be engendered amongst us all – a step onward to the far-off fulfilment of the divine message, 'On earth peace, goodwill toward men.'"[38]

The Industrial Revolution had brought about industrial growth and this, in turn, created the need for a new economic policy amongst States in order to maximise the utilisation of resources and take advantage of the new capabilities of production.[39] This new economic policy required "a correspondent legislative policy able to regulate the economic relationships: this policy, not unlike the economic policy, had to cross national borders."[40]

It is due to these economic needs that unification or harmonisation of commercial law has acquired such central importance. However, it is not sufficient to obtain uniformity of laws. It is equally important for the long-term success of those laws to achieve uniformity of their interpretation by the national courts or tribunals applying them.

The history of the efforts for the unification of international trade law has revealed not only the widespread desire of the participants in those efforts to successfully complete this project – evidenced by their continual discussion of the goals and methods of the project – but also the fact that any successful unification would both

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[38] Lord Justice Kennedy, "The Unification of Law", 10 *J.Soc'y Comp. Legis.* (1909) 211, at 214-215.
[39] *See* F.Ferrari, "Uniform Interpretation of the 1980 Uniform Sales Law", 24 *Georgia Journal of International and Comparative Law* (1994) 183. *See also* M.Glendon *et al., Comparative Legal Traditions in a Nutshell* (1982) 23, where the authors state that "as Europe emerged from the relative economic stagnation of the Middle Ages ... there appeared the need for a body of law to govern business transactions."
[40] Ferrari, *supra* note 39, at 184, fn.3, citing F.Galgano, *Il Diritto Privato Fra Codice E Costituzione* 47 (2nd ed., 1980).

require and facilitate the formation of an international community through the use of a common legal language.

The dual goals of promoting international commerce and promoting one uniform legal context that can facilitate it, have often been articulated.[41] What became apparent among commentators was not only that a successful unification of the international commercial law would necessarily entail the promotion of an international community,[42] but also that a sense of commonality was necessary in order to achieve further development of the law of international trade. R.H. Graveson's poignant remark, discussing the preconditions for unification, is on target:

> "[u]nification is likely to be most successful among countries that share a desire for unification of their legal systems for political, racial or other reasons, or even without such conscious desire if there exists a real social or economic need for unification."[43]

It is serendipitous, but also quite logical, that the needs of international commerce would also promote a widespread sense of shared purpose and understanding. This became evident quite early during the modern times of the unification work taking place in the late nineteenth and early twentieth centuries. This realisation assisted the unification movement in Western Europe in the late nineteenth and early twentieth centuries by emphasising the goal of international harmony and the World Wars

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[41] *See* R.David, "The International Unification of Private Law", in 2 *International Encyclopedia of Comparative Law* (Tübingen: Mohr, 1971), Chapter 5, at 328. *Cf.* Bagge, "International Unification of Commercial Law", in *International Institute for the Unification of Private Law* (1948) 253, at 253-55: "There must be some strong common practical interest in unification. A desire, in itself very commendable, to get the whole international community under the reign of one system of private law, thus contributing to peaceful intercourse between individuals and thereby also between nations, will, I am afraid, not be enough. But even where a common practical interest is evident the obstacles may be too great ...".
A condition for a successful international unification of such law is that the countries in question have a common culture and common conceptions and interests. For an excellent historical survey of various schools of thought regarding the relationship between international trade and world harmony, *see* F. Parkinson, *The Philosophy of International Relations* (1977), 91-110.

[42] M.Matteucci, "UNIDROIT: The First Fifty Years", in *New Directions in International Trade Law*, (UNIDROIT 1977), at xvii (arguing that the unification of private law would promote peaceful relations among nations and would also facilitate international commerce). *See also* G.Steenhoff, "Dutch Attitude Concerning the Unification of Private International Law", in *Unification and Comparative Law in Theory and Practice* (1984) 223 (an edition honouring J. Sauveplanne, comprised of essays discussing the value of international unification of private law; where the author examines efforts towards unification that emphasise world unity).

[43] R.H.Graveson, *One Law: On Jurisprudence and the Unification of Law* (1977) at 205. *See also*, Johnson, "Harmonisation and Standardisation of Legal Aspects of International Trade", 51 *Australian L.J.* (1977) 608 (commercial advantages of unification require international co-operation); David (1971), *supra* note 41, at 26 (unification of law "is political in nature, and must therefore be approached in a spirit of refinement and conciliation");

intensified this.[44] Unification of law is political in nature and requires an atmosphere of conciliation to foster it. It is not accidental that unification efforts in other parts of the world also accelerated after the wars.[45] In the United Nations, arguments for unification initially tended to focus on economic indicators and emphasised the economic benefits to be gained by the unification of trade law,[46] especially for the developing nations. The central idea of such arguments was the removal of obstacles, including legal obstacles, to international trade. This was seen as benefiting developing countries, whose economies depended largely on their foreign trade and would thus move faster towards economic development, as well as developed countries, whose trade would expand proportionately.[47]

However, soon enough the idea that the activity of international trade could itself provide a basis for friendly relations between nations, if it were structured by a common set of rules of equality, took the main stage during the debates of the General Assembly.[48] The statement of the delegate for Romania, during the discussion of the proposal to create UNCITRAL, is imbued with such feeling and is

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[44] *See* Matteucci, *supra* note 42, at xvii; Bagge, *supra* note 41, at 253.

[45] The Bustamante Code was accepted on February 28, 1928, and ratified by 15 Latin American nations: *see* David, *supra* note 41, at 149-150. The Council for Mutual Economic Aid was established in 1949 by Bulgaria, Czechoslovakia, Hungary, Poland, Rumania and the Union of Soviet Socialist Republics; its General Conditions for Delivery of Goods Between Organisations of Member Countries were adopted in 1958: *see* David, *ibid.*, at 194-195.

[46] *See, e.g.*, "Progressive Development of the Law of International Trade: Report of the Secretary-General", *21 U.N. GAOR* Annex 3 (Agenda Item 88), [U.N. Doc. A/6396], *reprinted* in 1 *Y.B.U.N. Comm'n on Int'l Trade L.* 18, at 41, [U.N. Doc. A/CN.9/SER.A/1970]: "it should be kept in mind that the unification process is desirable *per se* only when there is an economic need and when unifying measures have a beneficial effect on the development of international trade."

[47] *See* the Summary Record of the 948th Meeting, 1 *Y.B.U.N. Comm'n on Int'l Trade L.* 47, para. 1, [U.N. Doc. A/CN.9/SER.A/1970].

[48] *See, e.g.*, "Debate in the Sixth Committee of the General Assembly on Agenda Item 88 (Progressive Development of the Law of International Trade): Excerpts from the Summary Records", 21 *U.N. GAOR* C. 6 (947th-955th mtgs.), [U.N. Doc. A/6594], *reprinted* in [1970] 1 *Y.B.U.N. Comm'n on Int'l Trade L.*, [U.N. Doc. A/CN.9/SER.A/1970]. Mr. Piradov (Union of Soviet Socialist Republics): "...conditions were now favourable for the development of world trade, which in turn could help to promote peaceful coexistence"; *ibid.* at 49, Mr. Resich (Poland):, "The progressive development of the law of international trade was essential for the establishment of peaceful and normal relations between nations"); *ibid.* at 53, Mr. Sinha (India): "... peace must rest on a sound economic foundation and international co-operation based on equality"; *ibid.* at 54, Mr. Secarin (Romania): "...trade was one of the most important and dynamic elements of co-operation among States"; *ibid.* at 56, Mr. Yanko (Bulgaria}: "...international trade, based on the equality and mutual benefit of the parties, was a prime factor in co-operation between States".
See also, "Progressive Codification of the Law of International Trade: Note by the Secretariat of the International Institute for the Unification of Private Law (UNIDROIT)", [U.N. Doc. A/CN.9/L.19], *reprinted* in [1970] 1 *Y.B.U.N. Comm'n on Int'l Trade L.* 285, [U.N. Doc. A/CN.9/SER.A/1970]: "International trade is one of the most important factors in economic development and as such, a means of promoting understanding and peace among peoples.".

indicative of the tone prevailing in discussions relating to the unification of trade law thereafter:

> "The development of international trade, therefore, would meet real needs of the international community; it would be an essential contribution to the efforts to create ... conditions of stability and well-being, which were necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples. Accordingly, it was necessary to establish rules that would facilitate commercial transactions on the basis of respect for sovereignty and national independence, non-intervention in the domestic affairs of States and mutual benefit ...".[49]

It had now become apparent to those delegates active in the United Nations that the dual goals of developing international trade and promoting world harmony corresponded well with the mission of that organisation. In other words, the efforts towards the unification of international trade law exemplified the spirit of the U.N.'s articulated goal of promoting the New International Economic Order.[50]

3. THE OLD *LEX MERCATORIA*

The idea of a unified international trade law is not novel. In fact it is a revival of an ancient[51] trend towards unification which can be traced to the Middle Ages and which had given rise to the "law merchant".[52]

In order to understand the need for modern uniform law[53] and, further, evaluate its prospects for success or failure, it is necessary to outline the evolution of this trend from its ancient predecessors to its modern shape and form.

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[49] "Debate in the Sixth Committee of the General Assembly on Agenda Item 88 (Progressive Development of the Law of International Trade): Excerpts from the Summary Records", 21 *U.N. GAOR* C. 6 (947th-955th mtgs.), [U.N. Doc. A/6594], *reprinted* in [1970] 1 *Y.B.U.N. Comm'n on Int'l Trade L.*, at 54, [U.N. Doc. A/CN.9/SER.A/1970].

[50] *See*, "Progressive Development", *supra* note 46, at 42-43. *See also*, "Declaration on the Establishment of a New Economic Order", G.A. Res. 3201 (S-VI), *U.N. GAOR* (6th Special Session Supp. 1) at 3, [U.N. Doc. A/9559 (1974)]; "Programme of Action on the Establishment of a New Economic Order", G.A. Res. 3202 (S-VI), *U.N. GAOR* (6th Special Session Supp. 1) at 5, [U.N. Doc. A/9559 (1974)].

[51] *See* R.H.Graveson, "The International Unification of Law", 16 *Am. J. Comp. L.* (1968) 4, where the author states that "the international process of assimilating the diverse legal systems of various countries goes back into ancient history."

[52] Filip de Ly, *International Business Law and Lex Mercatoria* (1992), at 15, notes that "the medieval law merchant is also referred to as *lex mercatoria, ius mercatorum, ius mercatorium, ius mercati, ius fori, ius forense, ius negotiatorum, ius negotiale, stilus mercatorum* or *ius nundinarum*."

[53] The need for uniform laws has been widely acknowledged; *see e.g.*, David (1971), *supra* note 41; J.Honnold, *Uniform Law for International Sales Under the United Nations Convention* (Kluwer, 2nd ed., Deventer & Boston, 1991). However, there has also been some criticism against this trend; *see*

Historically, international trade law developed in three stages: the old "law merchant", its integration into municipal systems of law and the emergence of the new "law merchant".[54]

In the Middle Ages, commercial law appeared in the form of the "law merchant" – "a body of truly international customary rules governing the cosmopolitan community of international merchants who travelled through the civilised world, from port to port and fair to fair, wherever business offered itself."[55]

There were five elements which characterised the old *lex mercatoria*[56] and helped preserve its uniformity:

1) it was transnational; essentially the same law was applied wherever commerce was being conducted by the merchants of the time whatever the venue of the tribunal and the local variety of the custom.

2) its principal source was mercantile customs; and these customs, being derived from the law of the fairs and the customs of the sea, presented remarkable uniformity. We are informed that the law of the fairs was being applied

> "outside and above civil statutes and local commercial usages...Thus the fairs, this original form of terrestrial commerce, have been in the history of civilisation incomparable tools of reconciliation, of unification and of peace."[57]

The universality of character of the customs of the sea has been attributed to the fact that "the sea law was developed by merchants and was not the law of territorial princes".[58]

3) it was administered not by professional judges but by merchants themselves. Merchants settled their disputes in unique commercial courts that were in the nature of "modern conciliation and arbitration tribunals rather than courts in the strict sense of the word"[59] in proceedings that were speedy and informal, devoid of legal technicalities.

Graveson, *supra* note 51, at 5-6: "it may be necessary to correct the assumption that uniform law is good in itself and that the process of unification is one to be encouraged in principle."

[54] *See* C.M.Schmitthoff, "International Business Law: A New Law Merchant", in 2 *Current Law and Social Problems* 129 (1961).

[55] C.M.Schmitthoff, "The Unification of the Law of International Trade", *J. Bus. L.* (1968) 105.

[56] On the history of the law merchant *see*: T.F.T.Plucknett, *A Concise History of the Common Law* (5th ed., London, (1956) 657 *et seq.*; W.A. Bewes, *The Romance of the Law Merchant* (1986).

[57] M.Huvelin, *Essai historique sur les marches et les foires* (1985), *quoted* by Bewes, *supra* note 56, at 138.

[58] R.A.Wormser, *The Law* (New York, 1949), 500.

[59] *C.Schmitthoff's Select Essays on International Trade Law* (Chia-Jui Cheng, *ed.*) (Martinus Nijhoff, Netherlands, 1988) 24.

4) it stressed equity, in the medieval sense of fairness, as an overriding principle,[60] displaying a remarkable tendency "to decide cases *ex aequo et bono* rather than by abstract scholastic deductions from Roman texts."[61]

5) its universality was fostered by the activities of the notary public. The function of the notary public acquired great importance in the fourteenth century and thus notarial contracts, roughly equivalent to modern standard contracts, became common[62] and assisted the uniformity of this cosmopolitan "law merchant".

4. THE NATIONALISATION OF COMMERCIAL LAW

The second stage of the development of international trade law is marked by the incorporation of the "law merchant" into municipal systems of law in the eighteenth and nineteenth centuries, as the idea of national sovereignty acquired prominence. However, it is interesting to note that this process of incorporation differed in motives and methods of implementation.

In France the *Code de Commerce*, one of the five Napoleonic codes,[63] was enacted in 1807 underlining the concept of freedom of contract and asserting the notion of ownership as an absolute right. It has been said that the French codification is a result of a victorious political movement since the merchants and other professionals were prominent, and aligned with the winners, in the political events of the time.[64]

In Germany, on the other hand, the publication of a Uniform Commercial Code in 1861, adopted by most members of the German Confederation, has been described as "the legal reflection of the struggle for political unity"[65]; the creation of uniform law here being seen as an act that could give impetus to the efforts for political unification.[66]

Finally, it has been suggested that the motives for the incorporation of the "law merchant" into the English common law in the middle of the eighteenth century,

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[60] *See* H.J.Berman & C.Kaufmann, "The Law of International Commercial Transactions (Lex Mercatoria)", 19 *Harv. Int'l. L.J.* (1978) 221, at 225.

[61] R.B.Schlesinger, *Comparative Law* (2nd ed., Brooklyn, 1960), 185.

[62] *See* Bewes, *supra* note 56, at 6, where the author reports that in 1245 a single notary in Marseilles drafted more than a thousand commercial documents.

[63] *See* Schmitthoff (1988), *supra* note 59, at 25, *citing* A.Marx, *Die Franzosiche Handelsgesetzgebung* (1911) 1.

[64] *See* Schlesinger, *supra* note 61, at 323.

[65] *See* Schmitthoff (1988), *supra* note 59, at 25.

[66] For support on this point, Schmitthoff (1988), *ibid.*, refers to Brunner-Heymann, *Grundzuge der deutschen Rechtsgerichte* (7th ed.) 276.

which was achieved through the simplification of commercial procedure and the harmonisation of commercial custom and the common law, were economic rather than political.[67]

This integration of the "law merchant" into national systems of law initially may have benefited the nations which effected it, but it has been said that it also brought about the significant and negative consequences of nationalism[68] and intellectual isolation[69] in legal thought.

Despite the integration of commercial law into national systems of law, the origins of this branch of the law in the old "law merchant" and the universality of some of its fundamental elements were still visible to some jurists, like Lord Mansfield:

> "The mercantile law, in this respect is the same all over the world. For from the same premises, the same conclusions of reason and justice must universally be the same."[70]

More recently, in the beginning of the twentieth century, Sir Frederick Pollock wrote in similar tone:

> "Yet the law merchant has not wholly lost its old character. It has not forgotten its descent from the medieval law of nature which claimed to be a rule of universal reason embodied in the various forms of cosmopolitan usage. Conforming to English procedure and legal method, it can still be reinforced by additions drawn from established general custom."[71]

5. THE NEW *LEX MERCATORIA*

The third stage of the evolution is characterised by the increased involvement of the United Nations and the activities of specialised international organisations (such as UNCITRAL, UNIDROIT and the International Chamber of Commerce) which signal a return to a universal concept of trade law that characterised the old "law merchant". The new general trend of commercial law is to move away from the restrictions of national law and towards the creation of an autonomous body of international

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[67] *See* Schmitthoff (1988), *supra* note 59, at 26.
[68] On this point, *see* A.Tunc, "English and Commercial Law", [1961] *J.Bus.L.* 234, at 237.
[69] On this point, *see* Schlesinger, *supra* note 61, at 188.
[70] Per Lord Mansfield in Pelly v. Royal Exchange Assurance Co. (1757) Burr. 341, at 347.
[71] Sir Frederick Pollock in his *Introduction to the Commercial Law of Great Britain, and Ireland: I*, (William Bowstead and Sir Thomas E. Scrutton, eds.), in Vol. XIII of the Commercial Laws of the World, 11.

commercial law which represents "a common platform" for the jurists of the East and West, thus facilitating co-operation between capitalist and socialist countries.[72] This development has been welcomed and hailed as

> "the emergence of a new lex mercatoria ... a law of universal character that, though applied by authority of the national sovereign, attempts to shed the national peculiarities of municipal laws."[73]

The United Nations Convention on Contracts for the International Sale of Goods is a case in point and the subject of the analysis that will follow.

Fundamental differences may still exist between State-planned and market economies, but there are also some similarities in the legal technique of international trade transactions.[74] As it has been succinctly put:

> "international trade law specialists of all countries have found without difficulty that they speak a 'common language'."[75]

And it seems to be a truism to state that:

> "the law governing trade transactions is neither capitalist, nor socialist; it is a means to an end, and therefore the fact that the beneficiaries of such transactions are different in this or that country is no obstacle to the development of international trade. The law of international trade is based on the general principles accepted in the entire world."[76]

There is a distinct flavour reminiscent of Lord Mansfield's views in this statement. The new "law merchant", common to both capitalist and socialist economies, is being established with the participation of all sides, thus giving international commercial law its best chance ever to achieve uniformity. There have long been many loud calls for the creation of a "new law merchant"[77] in order to overcome the "anarchy upon which international relationships are based".[78] At the end of the 1920's, Ernst Rabel[79] suggested to the Governing Council of the International Institute for the Unification of Private Law (UNIDROIT) that it starts the work for

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[72] *See* Schmitthoff (1988) *supra* note 59, at 28.

[73] Schmitthoff, *ibid.*, at 22.

[74] *See* A.Goldstajn, "The New Law Merchant" [1961] *J.Bus.L.* 16.

[75] H.Trammer, *The Sources of the Law of International Trade*, (London, 1964) 42.

[76] A.Goldstajn, "The New Law Merchant Revisited" in *Festschrift fur C.M.Schmitthoff*, (Frankfurt, 1973) 174.

[77] Ferrari (1994), *supra* note 39, at 185, notes that the theory of the "new law merchant" has been developed by Professor Schmitthoff.

[78] *See* Ferrari, *ibid.*, who cites R.David, *I Grandi Distemi Giuridici Contemporanei* (1980) 9.

[79] Ernst Rabel's involvement has been widely acknowledged; *see* M.J.Bonell, "Introduction to the Convention", in C.M. Bianca and M.J. Bonell eds., *Commentary on the International Sales Law: The 1980 Vienna Convention* (Milan: Giuffrè, 1987) 3.

the unification of the law of international sales of goods.[80] It has to be noted, however, that while the old "law merchant" had developed from usage and practice, the new "law merchant" is the result of careful and, at times, political deliberations and compromises by large international organisations and diplomats. The repercussions of such action, which are not always benign, are examined in some detail in this thesis.

UNIDROIT decided to appoint a commission to be entrusted with the task of working towards that goal and in 1935 the first draft of a uniform law on the sale of goods was produced.[81] The events of World War II interrupted the development of this work, but in 1951 a new draft uniform law was presented in a conference at The Hague.[82] Work towards a unified sales law picked up momentum and more drafts followed.[83] Eventually, on April 1964, twenty-eight States took part in a Diplomatic Conference held at The Hague and approved two Conventions, creating the Uniform Law on the International Sale of Goods (ULIS),[84] and the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF).[85]

Those two Hague Conventions did not achieve the desired result of unification of sales law.[86] This failure has been largely attributed to the limited role played by Third World and Socialist countries in the contributions towards the Conventions.[87]

However, the efforts for unification of the substantive law of sales on an international level continued and in 1966 the United Nations established the United Nations Commission on International Trade Law (UNCITRAL) and gave it the task of promoting the progressive harmonisation and unification of international trade law, thereby signalling a new approach to the formulation of modern international trade law.[88]

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[80] UNIDROIT was set up in Rome in 1926 under the aegis of the League of Nations.

[81] For commentary on this draft, Ferrari (1994), *supra* note 39, at 190, refers to E.Rabel, "Der Entwurf eines Einheitlichen Kaufgesetzes", in *Rabels Zeitschrift fur Auslandisches und Internationales Privatrecht* (1935) 3.

[82] For details on the 1951 Conference, *see* E.Rabel, "The Hague Conference on the Unification of Sales Law", 1 *Am.J.Comp.L.* (1952) 58.

[83] For details on these drafts, *see* Bonell (1987), *supra* note 79, at 4.

[84] For the text of ULIS, *see* 13 *Am.J.Comp.L.* (1964) 453.

[85] For the text of ULF, *see* 13 *Am.J.Comp.L.* (1964) 472.

[86] The two Conventions were enacted only in eight states; *see* I.I.Dore and J.E.Defranco, "A Comparison of the Non-Substantive Provisions of the UNCINTRAL Convention and the U.C.C.", 23 *Harv. Int'l. L.J.* (1982) 49, at 50.

[87] *See e.g.*, F.Ferrari (1994), *supra* note 39, at 191-2.

[88] For general comments on UNCITRAL's mission and methods UNCITRAL's history, structure, mission and methods, *see* E.A.Farnsworth, "UNCITRAL - Why? What? How? When?", 20

The CISG resulted from work instituted in 1968 by the United Nations Commission on International Trade Law. Ten years of work in UNCITRAL produced the 1978 UNCITRAL Draft Convention. This draft (with a Commentary on it by the UNCITRAL Secretariat) was laid before a Diplomatic Conference held in Vienna in 1980, which unanimously approved the current uniform rules.[89]

6. THE U.N. CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (1980) – CISG

(a) Summary of UNCITRAL's legislative history of the CISG

The legislative history of CISG is of great importance; not merely as the starting point of reference to the law it promotes, but also as a crucial tool of understanding the meaning of that law. In determining the meaning of an international treaty, one of the rules of the U.N. Convention on the Law of Treaties (1969) is that recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty.[90] The principal commentator of CISG has correctly observed that

> "[w]hen important and difficult issues of interpretation are at stake, diligent counsel and courts will need to consult the [CISG's] legislative history. In some cases this can be decisive".[91]

The most recent segment of the legislative history of the CISG is reported in "United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980", *Official Records*, UN Document No. A/CONF. 97/19 (E.81.IV.3).[92] UNCITRAL Yearbooks report earlier stages of the legislative history of the Convention.[93]

Am.J.Comp.L. (1972) 314; J.Honnold, "The U.N. Commission on International Trade Law: Mission and Methods", 27 *Am.J.Comp.L.* (1979) 201-211.

[89] *See* J.Honnold, *Documentary History of the Uniform Law for International Sales*, (Kluwer 1989), 1.

[90] Article 32 of the Vienna Treaty Convention (1969).

[91] J.Honnold, "Uniform Laws for International Trade", *International Trade and Business Law Journal* (Australia, 1995) 5.

[92] Many UNCITRAL documents are cited in this work. For a guide to UNCITRAL's citation methodology, *see* J.Honnold, "UNCITRAL Documents: Research Sources, Style, Citation", 27 *American Journal of Comparative Law* (1979) 217-221.

[93] The most convenient reference tool for access to the U.N. documentation on the work of UNCITRAL is the series of UNCITRAL Yearbooks. The Yearbooks include:
- the reports by UNCITRAL on its annual sessions; these annual reports by UNCITRAL provide an overview of current work in process and summaries of debates on important issues, and set forth the legislative texts approved by the Commission,
- action by the General Assembly and other U.N. organs on the Commission's reports,
- the final texts of international conventions emanating from UNCITRAL,
- the reports of Working Groups and of the Secretary-General (this material is often difficult to obtain in its documentary form): these reports include intensive studies and drafts of legislative texts that provided the basis for the Commission's action,

(b) The background to the UNCITRAL development of the CISG[94]

The uniform rules in existence prior to the CISG were rooted in the 1964 Hague Conventions sponsored by the International Institute for the Unification of Private Law (UNIDROIT) – one dealing with formation of contracts for international sale (ULF), the other with obligations of parties to such contracts (ULIS) – which, in spite of their fundamental importance, failed to receive substantial acceptance outside Western Europe.[95]

The CISG was made in three stages:

(1) The UNCITRAL Working Group during the years 1970-1977 produced two draft Conventions. The first was the 1976 Draft Convention on Sales, setting forth the rights and obligations of the seller and buyer under the sales contract. The second Draft Convention set out the rules on Formation of the Sales contract, which the Working Group completed in September 1977.[96]

(2) The full Commission reviewed the Working Group's "Sales" and "Formation" drafts and combined them into one document – the 1978 Draft Convention on Contracts for International Sale of Goods. The Commission gave this draft Convention its unanimous approval and recommended that the U.N. General Assembly convene a diplomatic conference to review the draft and finalise a Convention.[97]

The records of stages (1) and (2) are reported in nine UNCITRAL Yearbooks (Yearbooks I (1968-1970) through to IX (1978)). However, the content of these Yearbooks can be difficult to access: none is adequately indexed; nor does their sequence of presentation of information necessarily follow the sequence of work by UNCITRAL and its Working Groups.[98] In addition, during the decade of UNCITRAL's preparation of the 1978 draft for a Sales Convention consensus was

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- bibliographies on the various topics in the Commission's program.

[94] The best source of consolidated data on these stages of the legislative history is Honnold (1989), *Documentary History*, *supra* note 89.

[95] *See* Honnold (1989), *supra* note 89, at 1.

[96] *Ibid.*, at 3.

[97] *Ibid.*

[98] Also, "[a]s the drafts moved through the legislative process their article-numbers kept changing. Thus the Commission's initial work was addressed to the articles (and article-numbers) of the 1964 Hague Sales Conventions. As articles were added, deleted, and reorganised, renumbering became necessary. At each legislative session action necessarily was based on the article and article-numbering of the draft brought to the session" (Honnold, *Documentary History*, *supra* note 89, at 4). Honnold's Documentary History presents Yearbook texts in a more orderly sequence with margin notes which key the CISG Articles that emerged to their differently numbered antecedents. In addition, each Yearbook text is introduced by a guide to its contents.

reached on each provision without ever taking a formal vote. Summaries of the discussions were faithfully recorded, but the lack of votes on proposals that were not explicitly accepted or rejected in reaching consensus could "blur contours of the decision." [99]

(3) The 1980 Vienna Diplomatic Conference, after five weeks of intensive work, unanimously approved the current uniform rules.[100]

Upon completion of the 1978 Draft, the Secretariat prepared a Commentary on it that summarised the thinking that led to this text.[101] The 1978 Draft was the working document presented to the delegates who attended the 1980 Vienna Diplomatic Conference.[102] The Vienna Diplomatic Conference made a large number of minor changes to the 1978 Draft but "very few of substance".[103] This Commentary is the closest counterpart to an Official Commentary on this Convention.[104]

(c) Introduction to the CISG

The end product of the activity outlined above is, in its complete name, the United Nations Convention on Contracts for the International Sale of Goods, Vienna (1980).[105] The reason for its conception and preparation by the United Nations Commission on International Trade Law and eventual adoption by a diplomatic conference on 11 April 1980, was the provision of a uniform text of law for international sales of goods. The CISG combines the subject matter of the two 1964 Hague Conventions which had failed to receive substantial acceptance outside Western Europe and had received widespread criticism of their provisions as reflecting primarily the legal traditions and economic realities of continental Western Europe,[106] which was the region that had most actively contributed to their preparation.

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[99] Honnold (1989), *supra* note 89, at 5-6.

[100] *See* Honnold, *ibid.*, at 1.

[101] For a discussion on the role played by the Secretariat during the most pivotal periods in UNCITRAL's development of the CISG *see*, Honnold (1991), *supra* note 53, at 53; *see also* E.A.Farnsworth, "Developing International Trade Law", 9 *Cal. Western Int'l L.J.* 468 (1979).

[102] The Secretariat Commentary which accompanied the 1978 Draft was prepared pursuant to United Nations General Assembly Resolution 33/93. *See* the *Text of Draft Convention on Contracts for the International Sale of Goods* approved by UNCITRAL together with the *Commentary* prepared by the Secretariat, A/CONF./97/5, 14 March 1979.

[103] *See* J.S.Ziegel, *Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods* (July 1980), at 5.

[104] Hence, the continued relevancy of much of the Secretariat Commentary on the 1978 Draft that is quoted extensively in this work.

[105] CISG is the popular acronym of the Vienna Sales Convention used throughout this work.

[106] *See, e.g.*, Honnold, *Documentary History*, *supra* note 89.

UNCITRAL's success in preparing a Convention with wider acceptability is evidenced by the fact that the original eleven States for which the Convention came into force on 1 January 1988 included States from every geographical region, every stage of economic development and every major legal, social and economic system. The original eleven States were: Argentina, China, Egypt, France, Hungary, Italy, Lesotho, Syria, United States, Yugoslavia and Zambia.

As of 13 January 2000, the UN Treaty Section reports that 57 States have adopted the CISG.[107]

The complete listing of CISG Contracting States is:

Argentina, Australia, Austria, Belarus, Belgium, Bosnia-Herzegovina, Bulgaria, Burundi, Canada, Chile, China (PRC), Croatia, Cuba, Czech Rep., Denmark, Ecuador, Egypt, Estonia, Finland, France, Georgia, Germany, Greece, Guinea, Hungary, Iraq, Italy, Kyrgystan, Latvia, Lesotho, Lithuania, Luxembourg, Mauritania, Mexico, Moldova, Mongolia, Netherlands, New Zealand, Norway, Peru, Poland, Romania, Russian Federation,[108] Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syria, Uganda, Ukraine, United States, Uruguay, Uzbekistan, Yugoslavia, Zambia.

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[107] For the updated list of Contracting States and specific identification of each of the countries that have subscribed to the CISG, effective dates and declarations or reservations, if any, applicable to each, *see* the Pace University School of Law and Institute of International Commercial Law website (www.cisg.law.pace.edu). One can also visit the autonomous network of CISG websites that exists on the internet: *Brazil* (http://www.cisg.law.pace.edu/galindo-da-fonseca/brasil-uff/); *Finland* (http://www.utu.fi/oik/tdk/cisg/cisg.htm); *France* (http://www.jura.uni-sb.de/FB/LS/Witz/cisg.htm); *Germany* (http://www.jura.uni-freiburg.de/ipr1/cisg); *Israel* (http://www.biu.ac.il/law/cisg/); *Italy* (http://soi.cnr.it/~crdcs/crdcs/case_law.htm); *Japan* (http://www.law.kyushu-u.ac.jp/~sono/cisg/index.htm); *Spain and Latin America* (http://www.uc3m.es/cisg); *United States* (http://www.cisg.law.pace.edu) .

[108] An Article 96 declaration is in effect for the Russian Federation: "In accordance with Articles 12 and 96 of the Convention, any provision of Article 11, Article 29 or Part II of this Convention that allows a contract of sale of its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in the [Russian Federation]." This is an authorised Article 96 CISG declaration. A consequence of Article 12 CISG, among other provisions of the CISG, is that the CISG supersedes otherwise applicable requirements of form to conclude a contract for the sale of goods. A Contracting State that does not desire this files an Article 96 declaration. September 1, 1991 is the date the Convention became effective for the USSR. The Russian Federation is regarded as successor to this treaty obligation. A similar ruling applies to Belarus and Ukraine. The succession principle does not apply to the other new States of the former USSR: Armenia, Azerbaijan, Kazakhstan, Tjikistan and Turkmenistan. For each of these States, the ruling of the Legal Officer in charge of the United Nations Depositary function is that a further treaty formality is required prior to making the CISG applicable [for purposes of Article 1(1)(a) CISG]. National courts will presumably make their own determinations on this issue. Former USSR States Estonia, Georgia, Kyrgystan, Latvia, Lithuania, Moldova and Uzbekistan have filed notices of accession to the CISG. The other cited States have not at this time filed notice of accession or succession to the CISG.

The text of CISG is divided into four parts:

- Part I; Articles 1 - 13, which deal with the sphere of application of the Convention and its general provisions.
- Part II; Articles 14 - 24, which contain the rules governing the formation of contracts for the international sale of goods.
- Part III; Articles 25 - 88, which deal with the substantive rights and obligations of buyer and seller arising from the contract.
- Part IV; Articles 89 - 101, which contain the final clauses of the Convention concerning such matters as how and when it comes into force, the reservations and declarations that are permitted and the application of the Convention to international sales where both States concerned have the same or similar law on the subject.

What follows is a quick overview of the structure and scope of CISG's provisions that can equip the reader with the minimum requisite information of CISG's substantive content, before the main issue of its interpretation can be discussed in detail. The basic knowledge of CISG's provisions will be useful to the reader not only in providing an overall picture of CISG as a whole but, more importantly, in enabling the reader to follow some of the arguments that the present writer develops using certain CISG provisions to support his thesis.

Part I. Sphere of application and general provisions

(i) Sphere of application

The articles on its scope of application state both what is included in the coverage of CISG and what is excluded from it.

The CISG applies to contracts of sale of goods between parties whose places of business are in different States and either both of those States are Contracting States (Article 1(1)(a)), or the rules of private international law lead to the law of a Contracting State (Article 1(1)(b)).[109]

The CISG governs contracts for international sales only, and Article 3 distinguishes such contracts of sale from contracts for services in two respects. "Contracts for the supply of goods to be manufactured or produced" are considered to be sales "unless the party who orders the goods undertakes to supply a substantial part of the

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[109] A few States have availed themselves of the authorisation in Article 95 CISG to declare that they would apply the Convention only in the former and not in the latter of these two situations. As the CISG becomes more widely adopted, the practical significance of such a declaration will diminish.

materials necessary for their manufacture or production" (Article 3(1)). In addition, when the "preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services", the CISG does not apply (Article 3(2)).

CISG contains a list of types of sales that are excluded from its application, either because of the purpose of the sale (goods bought for personal, family or household use: Article 2(a)), the nature of the sale (sale by auction, on execution or otherwise by law: Article 2(b),(c)), or the nature of the goods (stocks, shares, investment securities, negotiable instruments, money, ships, vessels, hovercraft, aircraft or electricity: Article 2(d), (e), (f)).[110]

It is made clear by Article 4 that the subject matter of CISG is restricted to "the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract". In particular, CISG is not concerned with the validity of the contract (Article 4(a)), the effect which the contract may have on the property in the goods sold (Article 4(b)), or the liability of the seller for death or personal injury caused by the goods to any person (Article 5).

(ii) The principle of "party autonomy"

The CISG contains an express recognition of the basic principle of contractual freedom in the international sale of goods. Article 6 states that the parties to a contract "may exclude the application of this Convention or [...] derogate from or vary the effect of any of its provisions".[111] The principle of party autonomy is central to the philosophy adopted in CISG and emphasises the institutional equality between buyers and sellers of different Contracting States that it attempts to establish in its text.

(iii) Interpretation of CISG

The adoption of CISG is only the preliminary step towards the ultimate goal of unification of the law governing the international sale of goods. The area where the battle for international unification will be fought and won, or lost, is the interpretation of CISG's provisions. Only if CISG is interpreted in a consistent

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[110] In many States, some or all of such sales are governed by special rules reflecting their special nature.

[111] The exclusion of CISG would most often result from the choice by the parties of the law of a non-Contracting State or of the domestic law of a Contracting State to be the law applicable to the contract. Derogation from the Convention would occur whenever a provision in the contract provided a different rule from that found in CISG.

manner in all legal systems that have adopted it, will the effort put into its drafting be worth anything.

It is natural that disputes will arise as to the meaning and application of CISG's provisions. However, CISG comes with its own, in-built interpretation rules. Article 7, the article of the greatest interest to us, directs all users that in the interpretation of CISG "regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade" (Article 7(1)). Further, users of CISG are told that questions concerning matters governed by the CISG which are not expressly settled in it, "are to be settled in conformity with the general principles" on which the CISG is based, or in the absence of such principles "in conformity with the law applicable by virtue of the rules of private international law" (Article 7(2)).[112]

According to Article 6 CISG, the parties may exclude the application of CISG or, subject to Article 12 CISG, derogate from or vary the effect of any of its provisions. Does this mean that the parties to a contract of sale governed by CISG may exclude the application of Article 7 CISG? The question is not only a theoretical one and the answer to it could have a profound effect in the application of CISG.

There is an argument against allowing parties to do away with Article 7 CISG *via* the autonomy given to them in Article 6 CISG. The essence of this argument is that "any legislation has to be interpreted in accordance with the criteria specifically laid down in it or generally adopted within the legal system from which it emanates."[113] This approach accepts that the parties to an international sales contract are free to choose between the application of CISG and the application of a particular domestic law. However, once the contracting parties have accepted that their contract of sale is to be governed by CISG, it is said that the provisions of CISG must be applied in accordance with the interpretation established in Article 7 CISG.

The present writer argues throughout this thesis that CISG, even after its incorporation into the various domestic legal systems, remains an autonomous body of law, intended to replace all the rules previously governing matters within its scope, whether deriving from statute or from case law. However, it is clear that Article 6 CISG expressly permits the contracting parties to derogate from, or exclude

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[112] The meaning of Article 7 CISG is analysed in detail in Chapters 3 and 4 of this thesis, *infra*.

[113] M.J.Bonell. "General provisions: Article 7", in C.M. Bianca and M.J. Bonell eds., *Commentary on the International Sales Law: The 1980 Vienna Convention* (Milan: Giuffrè, 1987) 65, at 93-4.

the application of, Article 7 CISG by agreeing on a different set of rules of interpretation – either used with respect to ordinary domestic legislation, or their own. It must be noted that such action jeopardises uniformity, but in this instance Article 6 does that. The principle of party autonomy is the paramount principle in CISG.

(iv) Interpretation of the contract; usages

The CISG contains provisions for the interpretation of statements and conduct of a party in the context of the formation of the contract or its implementation (Article 8). The parties to a contract governed by the CISG are "bound by any usage to which they have agreed and by any practices which they have established between themselves" (Article 9(1)). Any usage of which the parties "knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned", may also be binding on the parties to a contract of sale governed by CISG (Article 9(2)).

(v) Form of the contract

The CISG does not subject the contract of sale to any requirement as to form, such as writing (Article 11). However, if the contract is in writing and it contains a provision requiring any modification or termination by agreement to be in writing, Article 29 provides that the contract may not be otherwise modified or terminated by agreement. The only exception is that "a party may be precluded by his conduct from asserting such a provision to the extent that the other person has relied on that conduct" (Article 29(2)).[114]

Part II. Formation of the contract

Part II of CISG deals with a number of questions that arise in the formation of the contract by the exchange of an offer and an acceptance. When the formation of the contract takes place in this manner, the contract is concluded when the acceptance of the offer becomes effective (Art.18).

In order for a proposal for concluding a contract to constitute an offer, it must be addressed to one or more specific persons and it must be sufficiently definite (Art.14(1)). A proposal is deemed to be "sufficiently definite, if it indicates the goods

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[114] In order to accommodate those States whose legislation requires contracts of sale to be concluded in or evidenced by writing, Article 96 CISG entitles those States to declare that neither Article 11, nor the exception to Article 29 applies where any party to the contract has his place of business in that State.

and expressly or implicitly fixes or makes provision for determining the quantity and the price" (Art.14(2)).

The CISG takes a middle position between the doctrine of the revocability of the offer until acceptance and its general irrevocability for some period of time. The general rule in CISG is that an offer may be revoked (Art.16). However, the revocation must reach the offeree before he has dispatched an acceptance (Art.16(1). Moreover, an offer cannot be revoked if it indicates that it is irrevocable, which it may do by stating a fixed time for acceptance or otherwise (Art.16(2)(a)).

Furthermore, an offer may not be revoked if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer (Art.16(2)(b)).

Acceptance of an offer may be made by means of a statement or other conduct of the offeree indicating assent to the offer that is communicated to the offeror (Art.18(1)(2)). However, in some cases the acceptance may consist of performing an act, such as dispatch of the goods or payment of the price; such an act would normally be effective as an acceptance the moment the act was performed (Art.18(3)).

In the frequently problematic situation in contract formation where the offeree's reply to an offer purports to be an acceptance but contains additional or different terms, CISG provides that, if the additional or different terms "do not materially alter the terms of the offer",[115] the reply constitutes an acceptance, unless the offeror "without undue delay, objects orally to the discrepancy or dispatches a notice to that effect" (Art.19(2)). If the offeror does not object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

If the additional or different terms do materially alter the terms of the contract, the reply constitutes a counter-offer (Art.19(1)).

Part III. Sale of goods

(i) Obligations of the seller

The general obligations of the seller are "to deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention" (Art. 30). CISG provides supplementary rules for use

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[115] "Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially" (Art. 19(3) CISG).

in the absence of contractual agreement as to when, where and how the seller must perform these obligations (Arts. 31, 32, 33).

CISG provides a number of rules that implement the seller's obligations in respect of the quality of the goods. In general, the seller must deliver goods that are "of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract" (Art. 35(1)).

One set of rules of particular importance in international sales of goods involves the seller's obligation to deliver goods that are "free from any right or claim of a third party" (Art. 41), including rights based on industrial property or other intellectual property (*see* Art. 42).

In connection with the seller's obligations in regard to the quality of the goods, CISG contains provisions on the buyer's obligation to inspect the goods "within as short a period as is practicable in the circumstances" (Art. 38(1)). He must give notice of any lack of conformity with the contract "within a reasonable time after he has discovered it or ought to have discovered it" (Art. 39(1)), and at the latest "within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time limit is inconsistent with a contractual period of guarantee" (Art. 39(2)).

(ii) Obligations of the buyer

Compared to the obligations of the seller, the general obligations of the buyer are less extensive and relatively simple. Article 53 CISG states that the buyer must simply "pay the price for the goods and take delivery of them as required by the contract and this Convention". CISG provides supplementary rules for use in the absence of contractual agreement as to how the price is to be determined and where and when the buyer should perform his obligations to pay the price (Arts. 55-59), as well as defining the obligation to take delivery (Art. 60).

(iii) Remedies for breach of contract

The remedies for breach of contract are similar for both buyer and seller. If all the required conditions are fulfilled, the aggrieved party may require performance of the other party's obligations, claim damages or avoid the contract. The remedies of the buyer for breach of contract by the seller are set forth in connection with the obligations of the seller (Arts. 45, 46 - 52 and 74 - 77) and the remedies of the seller are set forth in connection with the obligations of the buyer (Arts. 61, 62 - 65 and 74

- 77). The buyer also has the right to reduce the price where the goods delivered do not conform to the contract (Art. 50).

Among the more important limitations on the right of an aggrieved party to avoid the contract is the concept of "fundamental breach". For a breach of contract to be fundamental, it must result "in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result" (Art. 25).

A buyer can require the delivery of substitute goods only if the goods delivered were not in conformity with the contract and the lack of conformity constituted a fundamental breach of contract (Art. 46(2)). The existence of a fundamental breach is one of the two circumstances that justify a declaration of avoidance of a contract by the aggrieved party (Art. 49(1)(a) for a declaration of avoidance by the buyer; Art. 64(1)(a) for the seller). The contract of sale can be avoided in one other situation only; in the case of non-delivery of the goods by the seller (*see* Art. 49(1)(b)) or non-payment of the price or failure to take delivery by the buyer (*see* Art. 64(1)(b)), the party in breach fails to perform within the additional period of time fixed by the aggrieved party under the "notice" provisions (Arts. 47, 63).

Other remedies may be restricted by special circumstances. For example, if the goods do not conform to the contract, the buyer may require the seller to "remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances" (Art. 46(3)). A party cannot recover damages that he could have mitigated by taking the proper measures (Art. 77). A party may be exempted from paying damages by virtue of "an impediment beyond his control" (Art. 79).

(iv) Passing of risk

Parties to an international sales contract usually regulate the issue of the passing of the risk in their contract either by an express provision or by the use of a trade term. The CISG, however, displays a complete set of rules on the issue for contracts of sale that do not contain a relevant provision and involve either carriage of the goods (Art. 67) or goods sold while in transit (Art. 68).

In all other cases the risk passes to the buyer when "he takes over the goods or, [...] from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery", whichever comes first (Art. 69(1)(2)). If the contract relates to goods that are not then identified, they must be identified to the

contract before they can be considered to be placed at "the disposal of the buyer" and the risk of their loss can be considered to have passed to him (Art. 69(3)).

(v) Suspension of performance and anticipatory breach

The CISG provides the parties with the right to suspend the performance of their own obligations if, prior to the date on which performance is due, it becomes apparent that one of the parties "will not perform a substantial part of his obligations" (Art. 71), and with the right to avoid the contract if "it is clear that one of the parties will commit a fundamental breach of contract" (Art. 72).

(vi) Exemption from liability to pay damages

A party is exempted from paying damages for failure to perform any of his obligations if he proves that "the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences" (Art. 79(1)). This exemption may also apply if the failure is due to the failure of a third person whom he has engaged to perform the whole or a part of the contract (Art. 79(2)). However, the party invoking this provision is subject to any other remedy available in CISG, including reduction of the price, if the goods were defective in some way.

(vii) Preservation of the goods

The CISG imposes on both parties the duty to preserve any goods in their possession belonging to the other party, with an entitlement to reimbursement by the other party for their reasonable expenses in performing such duty (Arts. 85, 86, 87). Under certain circumstances the party in possession of the goods may sell them (Art. 88(1)), or may even be required to sell them (Art. 88(2)). A party selling the goods has the right to "retain out of the proceeds of sale an amount equal to the reasonable expenses of preserving the goods and of selling them and must account to the other party for the balance" (Art. 88(3)).

Part IV. Final provisions

The final provisions of the CISG contain the usual clauses relating to the Secretary-General as depositary (Art. 89) and providing that CISG is subject to ratification, acceptance or approval by those States that signed it by 30 September 1981 (Art. 91), that it is open to accession by all States that are not signatory States and that the text is equally authentic in Arabic, Chinese, English, French, Russian and Spanish.

CISG permits a certain number of declarations. Those relative to scope of application (Art. 95) and the requirement as to a written contract (Art. 96) have been mentioned earlier. There is a special declaration for States that have different systems of law governing contracts of sale in different parts of their territory to the effect that the Contracting State may declare that the CISG does not extend to all of that State's territories (Art. 93). Finally, a State may declare that it will not be bound by Part II on formation of contracts or Part III on the rights and obligations of the buyer and seller (Art. 92). This latter declaration was included as part of the decision to combine into one Convention the subject matter of the two 1964 Hague Conventions.

7. FINAL REMARKS

UNCITRAL, trying to produce a more widely acceptable and successful uniform law on international sale of goods, revised the 1964 Hague Conventions. The outcome of these revision efforts was the drafting of a uniform sales law, officially known as the "United Nations Convention on Contracts for the International Sale of Goods, Vienna, (1980)", which came into force on January 1, 1988 and has since been adopted by more than fifty-seven States, among which are some of the major commercial countries of the world.

It remains to be seen to what degree, if at all, this relatively recent Convention on Uniform International Sales Law will achieve its objective of unifying the law of international sales between countries of different legal, social and economic order. The unification of law, in general, is desirable and is not based solely on material considerations. The unification of international commercial law is even more desirable since it can act as a total conflict avoidance device that, from a trader's point of view, is far better than conflict solution devices. However, unification of the law inevitably entails changes in the legal outlook of courts, scholars, practitioners and traders throughout the world. In the place of national commercial laws, CISG represents the new way of addressing the complex relationships of international trade. As will be argued in Chapter 2 of this work, CISG has created and defined an international community of sellers and buyers, in order to achieve such an ambitious goal. The input to the creation of the new unified legal construct has been wider than ever before because it was crucial for the development of that community that its

members considered themselves governed by this new common legal system that they themselves have helped create.

In the following Chapter, it will be argued that in order to facilitate the activities of that community, and to keep it united, CISG has attempted to introduce and establish a rhetorical system where its members can communicate, deliberate and co-operate with each other using a new common language. Our initial treatment of the nature of international sales law and the aspirations of CISG has revealed a number of further factors significant to its success and development. The wide participation in the drafting of CISG and its wide adoption rate are not sufficient elements for the achievement of uniformity in international sales. The decision of sellers and buyers to carry out their business under the provisions of CISG is necessary but also not sufficient. It is equally important for the long-term success of CISG to achieve uniformity of interpretation of its provisions by the national courts or tribunals applying them. Should domestic tribunals introduce divergent textual interpretations, this new unified law will be short-lived. The success of CISG depends in large part on the coherence and the quality of the treatment it receives from courts, arbiters, lawyers, and scholars interpreting some individual provisions that lack clarity or contain ambiguous language. The present writer will argue that CISG is and must be seen as a text that contains a comprehensive set of significant topics and terms and a set of values underpinning these terms. If domestic law is used to invade CISG's domain (whether in interpretation, or in gap-filling), CISG's language will lose its integrity and the whole structure will collapse. Individual problematic provisions can and must be construed with regard to CISG's underlying values if the overall structure is to be reinforced and enriched. This is the mandate expressed in Articles 7(1) and 7(2) CISG. The direction taken on this issue will determine whether the members of CISG's community form a true community of entities that abide to a uniform law, or simply a collective of independent entities who at times co-operate with each other *via* a harmonisation of sorts on specific topics.

The focal point throughout this work will be the issue of interpretation of the CISG. The present writer will argue that uniformity in the international sales law can not be achieved merely by the universal adoption of uniform rules but by the establishment of a uniform interpretation of these rules universally. The central component of this argument will be the interpretative analysis of the nature and scope of Article 7 CISG. The interpretation of Article 7 directly influences the fulfilment of CISG's

purpose as stated in its Preamble: The parties to the CISG have agreed upon the Convention, being of the opinion that the adoption of uniform rules which would govern contracts for the international sale of goods and take into account the different social, economic and legal systems, would contribute to the removal of legal barriers in international trade and promote its development.

There are three prerequisites to the fulfilment of CISG's purpose. The first is ratification and promulgation of the Convention. It is made on the public law level. The second is the awareness of the existence of the CISG and its incorporation into international trade. It is brought to life by business people and lawyers when entering transactions covered by CISG. The third prerequisite is the proper application of CISG in proceedings before courts and arbitral institutions of different countries, which is the subject matter of this thesis. The last two prerequisites belong to the private law field and deal with the application of CISG in practice. The present writer will argue that to maintain its uniform application in different States it is important to interpret and apply its provisions in a uniform manner. In this thesis, it will be argued that Article 7 demands that the interpretation and the filling of gaps in CISG be based on international general principles and methods, in order to achieve the underlying purpose of CISG as shown by its structure and its legislative history.

During the formative stages of CISG itself, numerous difficulties arose and were resolved through debate and compromise among the diplomatic delegates to the Vienna Convention – itself a rhetorical process.[116] The adoption of CISG being essentially a political act by the governments of member States made it inevitable that the final version of CISG contain several textual compromises, which, in fact, are unresolved substantive difficulties. The most significant of these difficulties relate to CISG's gap-filling procedures and its use of Western legal concepts; issues that highlight the precariousness of the community contemplated by CISG. These problems have now been introduced and underlined and will be discussed in detail in the following chapters of this work.

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[116] Professor Honnold has stressed the importance of discussion to the work of UNCITRAL, leading to consensus without the need for formal votes: *see* Honnold (1979), *supra* note 88, at 210-11. For one participant's wry view of this process, see G.Eorsi, "Unifying the Law (A Play in One Act, With a Song)", 25 *Am. J. Comp. L.* (1977) 658.

CHAPTER 2

ISSUES OF INTERPRETATION

ISSUES OF INTERPRETATION

1. INTRODUCTION

The United Nations Convention on Contracts for the International Sale of Goods attempts to unify the law governing international commerce, seeking to substitute one law for the many legal systems that now govern this area. Bearing in mind this, one should evaluate how well the text of the Convention articulates a single legal system, and whether the Convention will be widely accepted. Several important analyses have evaluated CISG from this perspective, and the authors have disagreed on how successful CISG will be in reaching this unifying goal.[117] Leaving aside, for the time being, the merits of the opposing opinions on the success, or failure, of CISG to unify the law of sale of goods on an international scale, the context of the Convention's drafting and ratification must be more closely examined. Such an examination is necessary in order to bring to the foreground the forces that give CISG its intrinsic qualities and to highlight the nature of the problems associated with such a legal instrument.

CISG is a legal instrument that is meant to subject people from different legal cultures to its set of rules and principles. In turn, all these different legal cultures have to comprehend and conform to these rules and principles since the CISG will become part of their own set of laws. Uniformity, as has been stated before in this thesis, is not guaranteed by the mere adoption of the uniform laws contained in the CISG. Other fundamental conditions – perhaps the most important, but, probably, also the most difficult ones – to achieving uniformity on an international scale are, first, that the relevant set of laws is interpreted similarly in the different legal systems and, second, that the uniform law has an innate ability to develop in a uniform fashion according to the needs of the parties whose relationships it governs or in response to future changes of world trade dynamics. As has been said more eloquently elsewhere, the success of a uniform law code which intends to bind parties transacting world-wide depends on the creation of

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[117] *Compare* A.Rosett, "Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods", 45 *Ohio St. L.J.* (1984) 265 (concluding that the CISG will not be successful in harmonising the law of international trade) and J.Hellner, "The UN Convention on International Sales of Goods - An Outsider's View", in Jayme, Kegel & Lutter eds., *Ius Inter*

> "an international community of people who perceive themselves as bound together and governed by a common legal system and who have some way to deliberate together over matters of continuing verification and development".[118]

It is this achievement of establishing an "international community", a kind of international legal consensus, that is regarded by some as the true underlying purpose of CISG and as the key to its eventual triumph or demise.[119] This is also the focus of the most forceful criticism of CISG, as it has been argued that international consensus on significant legal issues is impossible.[120]

2. THE VIENNA CONVENTION'S "RHETORICAL COMMUNITY"

The above overview of the task facing a set of laws purporting to unify the field on an international scale, just as the CISG is purporting to achieve, sets the background for a closer examination and analysis of the context of the Convention's drafting and ratification.

In order to satisfy the fundamental conditions stated above, *i.e.*, uniform interpretation and uniform development, and thus go a long way towards achieving its goal, the text of CISG had to bring, and keep, together a "rhetorical community in which its readers first assent to the language and values of the text itself, and then use the language and values to inform their relations with one another"[121]. The term "rhetorical community", as first used by Professor Kastely to describe the coming together of States and parties interested in international sales, is problematic and prone to criticism on the grounds of definitional ambivalence, at best, or of opaqueness and vagueness, if not contextual inappropriateness, at worst.[122] However,

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Nationes: Festschrift fur S. Riesenfeld (Heidelberg, 1983) 71 (concluding that even with its shortcomings, the CISG will provide a basis for unification of the law of international commerce).

[118] A.H.Kastely, "Unification and Community: A Rhetorical Analysis of the United Nations Sales Convention", 8 *Northwestern J. Int'l L & Bus.* (1988) 574-622, at 577.

[119] *See* Kastely, *ibid.*

[120] *See* Rosett, *supra* note 117, at 282-286; *see also* Comment, "Unification and Certainty: The United Nations Convention on Contracts for the International Sale of Goods", 97 *Harv. L. Rev.* (1984) 1984. This criticism, however, dismisses the possibility of genuine discourse within the international community too easily; *see* Kastely, *supra* note 118, at 577, fn. 9.

[121] Kastely, *supra* note 118, at 577.

[122] *The Macquarie Dictionary* (Macquarie University, N.S.W., 1982; reprinted in the United Kingdom by The Chaucer Press, Suffolk, 1984) offers the following definitions of "rhetoric": 1. Art or science of all specially literary uses of language in prose or verse, including the figures of speech. 2. Exaggeration or display in writing or speech. 3. (In classical oratory) art of influencing the thought of one's hearers. *Cf.* the definition given by *The Lexicon Webster Dictionary* (Encyclopedic ed., The English language Institute of America, Inc., 1979), *Vol II*: "The art or branch of knowledge which

the present writer believes that the term could be functional if it were used to denote the existence of an established system of discourse, a continuing dialogue and discussion among the members of that community on the meaning and application of CISG to their dealings, which, according to the present writer, represents the quintessence of the United Nations unifying effort. The drafters of CISG managed to create such a community by establishing a sense of shared interest, responsibility and participation among its readers, by making the forum for the drafting of CISG as broad as possible and by including representatives from all major legal systems in the deliberations for the creation of this uniform law code. The dynamic of this discourse that created the CISG was, according to the present writer, also meant to carry through to the Convention's interpretation and application in action, thus materialising what would have otherwise been a mere theoretical unification with no real function or pragmatic significance.

However, it was unavoidable that the CISG would have to be a political and rhetorical deed, if only in order to come into existence. Political, since it had to be signed during a diplomatic conference – a fact that explains the existence of, or even the necessity for, many glaring compromises in the drafting of CISG's provisions, in order to get the approval of delegates from different socio-legal systems. Rhetorical, since it had to establish a "textual community"; the text of CISG had to address an international community of people engaged in a specific activity, that of international sale of goods, *via* a new common language (a new *lingua franca*),[123] and to provide the regulatory background for their activity. In this context, "rhetoric" has been described as the art of rendering an indeterminate situation determinate for the purpose of action, the "art of discourse and deliberation".[124] The importance of language in the relationship of discourse that CISG attempts to establish, between parties with diverse geopolitical origins and socio-legal traditions, cannot be stressed enough. Indeed, it is this linguistic element of the Convention that gives the text its coherence, as well as its vulnerability. This point acquires added significance since our treatment of CISG is focused on the issue of its interpretation *via* an analysis of

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treats the rules or principles underlying all effective composition whether in prose or verse; the art which teaches oratory; persuasive oratory; eloquence, esp. artificial eloquence; bombast".

[123] For a more detailed discussion of the new *lingua franca*, *see* the section on CISG's language, Chapter 2. *infra*.

[124] *See* Kastely, *supra* note 118, at 578, with fn. 10.

the nature, scope and function of Article 7 CISG, the Convention's interpretation provision.

In this Chapter, the present writer will examine in some detail the nature and constitution of the community established by the CISG, and some of the basic problems and controversial issues associated with the acceptance of a uniform law for the sale of goods on an international scale.

3. THE NATURE OF THE COMMUNITY ESTABLISHED BY CISG

According to Professor Kastely, CISG is a "rhetorical text", contemplating and creating an "international rhetorical community".[125] In essence, CISG, by inviting its ratification by government leaders throughout the world, offers the world community a new, uniform language in which to conduct and discuss international trade. CISG deals with significant issues affecting international trade and offers to the members of the "community" that embrace its text a set of terms in which these issues can be discussed and deliberated upon. CISG implicitly recognises a set of roles (*e.g.*, buyer, seller), shared expectations (*e.g.*, the fulfilment of the respective obligations of the buyer and the seller to a contract that the CISG governs), and occasions for dispute and deliberation (*e.g.*, where there are gaps in the law). What follows is an examination of the nature of the community that CISG attempts to establish and bind and the relationship of that community with the text of CISG.

(a) The Community and its Members

The Preamble to CISG reveals its author: "The States Parties to this Convention ... have agreed as follows ...". The text that follows this passage is framed as a statement by the States that are united as a single author of the international instrument in question. The Preamble is addressed to an audience, which is composed of all States who may consider joining the Convention and all traders, lawyers, courts, and arbiters concerned with the activity of international trade.

It has been correctly noted, however, that the line between author and audience in this text is doubly blurred.[126] At the time of the approval of the final draft of CISG, no State could yet ratify it and thus, technically, there were no States parties to the

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[125] *See* Kastely, supra note 118, at 585. *See also*, the present writer's critical treatment and reformulation of the term "rhetorical community", earlier in Chapter 2, *supra*.

[126] *See* Kastely, *ibid.*, at 585 ff.

Convention; all States were among the audience. At the same time, however, the ratification process was established as a way for nations to become parties to the Convention. Thus the mechanism existed for members of the audience to join as authors of CISG's text. Kastely has argued that this blurring of author and audience is significant to the rhetorical character of the CISG, as it

> "emphasises the potentially creative role for the members of the community it seeks to create. By highlighting the fluid character of the document's author and audience, the text offers to its readers the possibility of joining the community on an equal footing with other member states."[127]

Although Kastely's de-constructive linguistic analysis of the Preamble seems too technical, it highlights an important point; due to this linguistic "sleight of hand" performed by the Preamble, all the existing and potential members to the Convention are seen as equals and the "feel good" factor is firmly entrenched amongst them. The goal was to make CISG attractive to all potential signatories. With a long history of unsuccessful attempts in creating uniform international trade laws,[128] mainly because minimal membership to the drafting of such laws led to minimal membership in the community adopting them, the atmosphere created by CISG had to be one of equality and openness. Of course, CISG will ultimately be judged on the substance of its provisions and their use by the members of its community. But it is clear from the outset that CISG represents a serious, major attempt to unite international trade. Even to the last detail.

(b) The Preamble

The Preamble to the CISG also seems to describe the character of the union among the States who have authored the text with those who read it. The words of the Preamble seem to emphasise the conscious act of agreement by the member States (*i.e.*, "The States ..., Bearing in Mind ..., Considering ..., Being of the Opinion ..., Have Agreed ....").

The wording used in the Preamble indicates that the union of nations by CISG is the result of careful consideration and express agreement. Joining the international community of CISG is – and is seen to be – a positive act by its members, thus making all member States part of a wide, thoroughly consensual and deliberative community. However, the fact that most of this is in standard treaty language clearly

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[127] Kastely, *ibid.*, at 585-6.

[128] For a more detailed discussion of this history, *see* Chapter 1, "Uniform International Sales Law: From *Lex Mercatoria* to CISG", *supra*.

undercuts the strength of any proposal to attach greater meaning or importance to the CISG Preamble, which states the following:

> THE STATES PARTIES TO THIS CONVENTION
>
> BEARING IN MIND the broad objectives in the resolutions adopted in the sixth special session of the General Assembly of the United Nations on the establishment of a New International Economic Order,
>
> CONSIDERING that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,
>
> BEING OF THE OPINION that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade,
>
> HAVE AGREED as follows:...[129]

The purpose of the CISG, as set forth in this passage of the Preamble, is to contribute to a new international economic order, to promote friendly relations among the member States, and to encourage the development of international trade. The relationship among the States that have joined, or that will join, in this Convention exists not merely in the writing and reading of CISG but also in the world beyond the text, as an actual political and economic community. The international communality that characterised the drafting of CISG (although not its predecessors) is highlighted in this opening statement in order to remind all users of CISG of the benefits (psychological and material) that their membership entails despite their different social and legal domestic traditions.

On this point, Kastely argues that the community formed by the Preamble is "both consensual and motivated by self-interest", as she states that "its main focus is on the possibility of encouraging international trade, to the benefit of both industrialised and the developing nations".[130] However, there are some valid objections to this argument. Professor Winship's reading of the same text stresses the altruism implicit

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[129] The Preamble was drafted at the 1980 Conference and it was adopted without significant debate. *See* the *Report of the Drafting Committee*, U.N. Doc. A/CONF.97/17, *reprinted* in *U.N. Conference on Contracts for the International Sale of Goods, Official Records* (1981)[*hereinafter, U.N.Official Records*], at 154; *Summary Records of the 10th Plenary Meeting*, paras. 4-10, U.N. Doc. A/CONF.97/SR.10, *reprinted* in *U.N. Official Records*, at 219-220.

[130] Kastely, *supra* note 118, at 588 *et. seq*.

in it rather than any self-interest.[131] This alternative reading focuses on several new phrases found in CISG's Preamble that have also been added to the preambles of prior treaties and which respond for the first time to certain concerns of developing countries.

The present writer is of the opinion that it is more sound and appropriate to view the act of joining the community formed by CISG as an apt recognition of the equal status of less developed countries. There is, however, an inherent danger in analysing such admirable projects of "unification on equal terms". The wishful thinking that accompanied the lengthy preparation of CISG (and is reflected in the formal language of the Preamble) and the corresponding relief and euphoria generated after its official introduction to the world, may blind the faithful and obscure the real benefits conferred upon the developing States. There lies the danger that CISG may prove to be a symbolic gesture only, unless we are able to ascertain in real terms the benefits to be gained by the developing States from the CISG. Only the correct interpretation and uniform application of the text can safeguard the benefits conferred to the developing States by CISG's principles of equality and fairness.

It has been correctly noted that a rhetorical analysis of CISG becomes stronger when we compare its text to that of other similar documents.[132] A comparison of the documents can identify what is new, what is old and what is omitted, or added.

In accordance with United Nations practice, the Preamble provisions were prepared during the Diplomatic Conference that adopted the Convention, in Vienna. Professor Bonell has stated that the purpose of the Preamble to an international agreement is "to indicate the aim of the agreement and any specific considerations underlying it" and has concluded that the Preamble to CISG is much more developed than those of other Conventions already prepared within UNCITRAL.[133] The Preamble to the United Nations Convention on the Limitation Period in the International Sale of Goods (1975) was restricted to two clauses:

> Considering that international trade is an important factor in the promotion of friendly relations among States,

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[131] *See* P.Winship, "Commentary on Professor Kastely's Rhetorical Analysis", 8 *Northwestern J. Int'l. L. & Bus.* (1988) 623-639, at 625.

[132] *See* Winship (1988), *supra* note 131, at 624.

[133] *See* Bonell (1987), *supra* note 79, at 23-5. The present writer has used Professor Bonell's analysis on this point extensivelly.

> Believing that the adoption of uniform rules governing the limitation period in the international sale of goods would facilitate the development of world trade [...]

while the United Nations Convention on the Carriage of Goods by Sea (1978) was even more frugal:

> Having recognised the desirability of determining by agreement certain rules relating to the carriage of goods by sea [...]

Subsequent to its drafting, the Preamble to CISG has strongly influenced the wording of the Preamble to the Convention on Agency in the International Sale of Goods (1983).

The examination of the relationship between the above Preamble provisions reveals that the references that can be found in the CISG Preamble (to *"the development of international trade"* as *"an important element in promoting friendly relations among States"* and *"the adoption of uniform rules which govern contracts for the international sale of goods"* as contributing to the promotion of *"the development of international trade"*) bear striking similarities to the Preamble to the 1975 Limitation Convention.

On the issue of the similarity of the wording in the CISG Preamble with the wording of other instruments, it can be said that repetition of clauses from prior documents in the CISG Preamble raises the question of whether the repetition is a reaffirmation of the ideas and principles contained therein, or merely a stylistic formula and nothing more; the latter representing the orthodox position. The new references made in the CISG Preamble, on the other hand, obviously highlight topics on the minds of the drafters of CISG at the time of drafting.

The lack of dispute, objection or controversial debate about the Preamble has been interpreted by one academic as reflecting "the broad acceptance of the principles underlying the Preamble".[134] However, the better position on this point is that this is not necessarily so. It has been proposed that the language in paragraphs two and three of the Preamble to CISG, which is also found in prior treaties, "could reflect indifference to the use of language that has become familiar and considered innocuous".[135] The present writer also agrees that the standard form of the language used in CISG's Preamble limits any importance or intrinsic significance that can be attached to it. However, the CISG Preamble is unique in that it incorporates certain

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[134] *See* Kastely, *supra* note 118, at 586.

ideas that reflect the concerns of a number of States, which had not been expressed before. In particular, concerns of the third World countries, such as:

(i) the reference, in the first paragraph, to the New International Economic Order;

(ii) the development, in the second paragraph, of the corresponding provisions in the 1975 Limitation Convention (cited above) so as to refer to "equality and mutual benefit"; and

(iii) the reference, in the third paragraph, to "different social, economic and legal systems" and to "the removal of legal barriers in international trade".

The Preamble provisions in CISG are also more developed than those of the 1964 Convention Relating to a Uniform Law on the International Sale of Goods (ULIS), which speak of the States signatory to the Convention as "[d]esiring to establish a uniform law on the international sale of goods".

The importance of the wording of CISG's Preamble and the weight to be placed on it cannot be fixed precisely yet. We can get some guidance from Article 31(2) of the United Nations Convention on the Law of Treaties (1969), which specifically mentions the Preamble of a treaty as being part of the context for the purpose of the interpretation of the treaty. However, the problem that arises regarding CISG, apart from the fact that the majority of its Preamble provisions is in standard form, is that the rules for its interpretation are specifically provided in Article 7 CISG. The significance of this point is not missed on Bonell, who states succinctly that

> "the scope for interpretation in the light of the Preamble may not be very wide and it will be of interest to see how far the case law may accord its provisions the status of something more than general declarations of political principle." [136]

The present writer believes that the presence of a clearly marked, specially prepared interpretation section in a Convention does not justify an expansive role for its Preamble. This would entail that the value of CISG's Preamble as an interpretative tool must be diminished. The CISG represents a major development in international law, in the wider context of the history (political, as well as legislative) of the unifying efforts; its Preamble merely reflects this in formal language and structure. The CISG Preamble can not and should not solve interpetative issues directly; it formally mentions the main principles that imbue the Convention and which are so vital to its identity and faithful application. Some of its main principles (*e.g.*,

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[135] *See* Winship (1988), *supra* note 131, at 625.

internationality, uniformity) are also found in the interpretative provisions in Article 7(1), proving only an ideological connection between the Preamble and Article 7 CISG. However, introducing and accompanying a Convention marked by important diplomatic and textual compomises, the value of this Preamble should not be lost completely, albeit as a beacon or an outer-marker of the general direction that CISG's interpretation should follow.

(c) The 1964 Uniform Law Conventions

A second example of the insight that the juxtaposition of texts can provide arises from a comparison between the 1964 Hague Sales Conventions[137] and CISG.

Two main points can be made here. First, the drafters of the Hague Conventions distinguished between the law of contract formation and the substantive rights of contract parties. Second, the drafters addressed these Conventions to Contracting States, while the uniform laws addressed to sellers and buyers were set out in separate "uniform laws" appended to the Conventions. The CISG eliminates both distinctions. In CISG, formation provisions are combined with substantive contract provisions,[138] and the formal provisions of the old Conventions are combined with the text of the uniform laws that had been appended to the Conventions.

The consequences of eliminating such distinctions are the subject of some academic interest. Could it be that contract formation provisions should be treated separately because they are addressed, directly or by analogy, to a broader audience (*i.e.*, all parties who contract with each other, irrespective of the object of the contract) than the audience of sellers and buyers interested in their rights and obligations under a sales contract? Even the question of whether treaty provisions addressed to States in their sovereign capacity should be clearly separated from those provisions addressed to parties to a sales contract has interested some commentators.[139] However, it is the view of the present writer that these innovations found in CISG have stylistic

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[136] *See* Bonell (1987), *supra* note 79, at 25.

[137] Convention Relating to a Uniform Law on the International Sale of Goods, July 1, 1964, 834 *U.N.T.S.* (1972) 107; Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, July 1, 1964, 834 *U.N.T.S.* (1972) 169.

[138] But *see* Art. 94 CISG (authorising a Contracting State to declare that it will not be bound by Part II (Formation of Contract) or Part III (Sale of Goods)).

[139] According to Professor Winship, *supra* note 131, at 626, this question is not a trivial one. Winship notes that "in the United States ... the format of the Sales Convention has important implications on how the Convention would become law in the United States. A combined text permitted the Convention to become law by action of the Senate alone, without the need for implementing legislation enacted by both houses of the Congress. This would not have been possible if the format of

consequences only, by affecting its presentation. There is a substantial shortening of the overall text and the finished product (the text of the Convention) looks more compact and complete.

A third example of how the comparison between CISG and prior, related instruments may enrich an analysis of CISG and foster better appreciation of it, involves an omission from the CISG of a provision found in an earlier text. The point being made here is that silence on an issue may itself have important implications in the interpretation of a document that has been drafted through a revision of its predecessors. The issue we are concerned with here is whether parties may exclude the application of CISG by implication, or whether they may only do so effectively by express agreement. Article 3 of the Convention Relating to a Uniform Law on the International Sale of Goods (1964) stated that exclusion could be either express or implied. The UNCITRAL Working Group omitted this formula when drafting CISG on the ground that the provision "might encourage courts to conclude, on insufficient grounds, that the [Sales Convention] had been wholly excluded."[140] Several delegates to the 1980 Conference attempted to resolve this issue by amendment but failed. Professor Winship has argued that despite this inconclusive legislative history, express exclusion should not be required.[141] When analysing this question, however, some attention must be paid to explaining the omission of the clause in the 1964 text. A narrow reading of the permission to opt out of the Convention would be required in order to keep the community together. However, such a reading would probably offend a general principle on which CISG is based – the autonomy of the contracting parties, as is provided in Article 6 CISG. It is evident that in the creation and interpretation (let alone in the potential application) of uniform laws carrying ambitious goals there are many points of friction and antithesis. As will be argued further on in this thesis, only with a healthy dose of good will (to avoid the loaded term "good faith") and certain inevitable compromises can one overcome such difficult points. The achievement of establishing an "international community", a

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the 1964 conventions had been used". *See* P.Winship, "Congress and the 1980 International Sales Convention", 16 *Ga. J. Int'l & Comp. L.* (1986) 707, at 721-24.

[140] Working Group on International Sale of Goods: *Report of Work of Second Session*, U.N.Doc. A/CN.9/52, para 45 (1971), *reprinted* in [1971] 2 *Y.B.U.N. Comm'n on Int'l Trade L.* 50, 55, U.N. Doc. A/CN.9/SER.A/1971.

[141] *See* P.Winship, "The Scope of the Vienna Convention on International Sales Contracts", in N.M.Galston & H.Smit eds., *International Sales: The United Nations Convention on Contracts for the International sale of Goods*, Chapter 1, (New York: Matthew Bender, 1984), at para 1.02[5] (containing more complete citations to the drafting history).

kind of international legal consensus, is the underlying purpose of CISG and the key to its eventual triumph or demise.

(d) The Audience of the 1980 Vienna Convention

The CISG endeavours to be the medium for a specific message of international unification in the area of sales law. But what about the recipients of this message? Who are they? What is the audience of CISG? On the theoretical level, there is debate as to the identity of CISG's audience. One scholar groups together the readers of CISG as "the States which would ratify and the traders, lawyers, courts, and arbiters who would use the Convention to structure and guide future transactions and deliberations".[142] Another scholar, on the other hand, argues that different parts of CISG address different audience groups; (a) certain CISG provisions are addressed primarily to States (the Preamble and Part IV), and (b) other parts of CISG are addressed primarily to trading enterprises (Parts I, II and III).[143]

It is the view of the present writer that the latter analysis is the better one. However, the differences in scholarly opinion as to the identification of CISG's audience and other similar academic distinctions are ultimately irrelevant since they affect neither the reality of CISG's need to exist as a useful body of law internationally, nor its actual application and interpretation. In practice, it is the traders using, or choosing not to use, CISG that will predominantly decide the fate of CISG in attaining, or failing to attain, the requisite level of use which will justify the long effort for its creation. This statement is not an attempt to oversimplify the issue of the success or failure of CISG. Rather, it is a reminder that irrespective of infinite academic diatribes about fine distinctions and theoretical analyses of CISG, the future of CISG depends on its daily, practical use by merchants. This thesis notes the importance of the group of CISG users entrusted with the responsibility of interpreting CISG in a uniform manner and figures of authority who may wish to intervene in order to preserve the community or to hand out justice (*e.g.*, judges, arbiters *etc.*). Indeed, the present work is itself an endeavour to contribute in a positive manner to such efforts to interpret and apply CISG in the real world of merchants. However, it is the belief of the present writer that a closer study of the audience group comprised of traders carrying out their transactions under the umbrella of CISG ("the audience of trading enterprises", if you prefer) would produce more significant insights into CISG's

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[142] Kastely, *supra* note 118, at 577.
[143] *See* Winship (1988), *supra* note 131, at 627-8.

substantive sales law provisions. Leaving aside the question of whether there presently exists a distinct community of international traders,[144] Professor Winship divides the audience of trading enterprises as follows:[145]

(1) enterprises which have not yet entered into an international sales contract;

(2) enterprises that enter into a contract with another enterprise governed by CISG;

(3) enterprises involved in a dispute.

Different parts of CISG are addressed to each of these groups.

(1) Enterprises that have not yet entered into an international sales agreement will be interested primarily in the Convention's sphere of application (Part I, especially Chapter 1). If it is to reap the fruits of uniformity, the text of CISG must persuade these enterprises (a rather large and diverse community) to become a participating enterprise by entering into contracts governed by CISG. To achieve this goal, CISG employs two devices:

   (a) the relative simplicity of the scope provisions (Articles 1-5 CISG, notwithstanding the complexity of Art. 1(1)), and

   (b) the affirmation of the principle of freedom of contract (Article 6 CISG).

Implicit in the straightforward statement of CISG's sphere of application is the suggestion that enterprises that opt to have the CISG apply to their contract will benefit from the decreased legal transaction costs that they would otherwise incur without CISG. These transactional costs would include difficulties in

   (i) reaching agreement on applicable law,

   (ii) determining which State's domestic law is applicable if agreement is not reached, and

   (iii) proving what the foreign domestic law is.

Traders who choose to use CISG are taking part in a more efficient "community", which is in their interest.

(2) Enterprises that decide to enter into a contract governed by CISG form a separate audience group. The main questions concerning members of this group are

   (a) whether they have concluded enforceable contracts, and

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[144] Winship, *ibid.*, at 629, fn. 21, notes that Phillipe Kahn has argued that there is a distinct community of international traders ("*la societe internationale des commercants*") that sociological study can identify; *see* P.Kahn, *La Vente Commerciale Internationale* (1961). Winship continues that, "if there is such a pre-existing community then, of course, one could study how that community reacts to the Sales Convention. Rhetorical analysis, however, is apparently not concerned with this sociological dimension"; *ibid.*

[145] *See* Winship, *ibid.*, at 629.

(b) what the terms of the contract are.

This audience group will be most interested in the contract formation rules of Part II and the supplementary provisions in Part III.

A comparison between CISG's provisions and the Uniform Commercial Code of the United States, with respect to contract formation and the contract terms supplied in the absence of agreement by the parties, provides a further insight into this issue. The CISG does not have a provision similar to U.C.C. § 2-204;[146] its supplementary provisions are less comprehensive than those found in U.C.C. Article 2, Part III. Academic opinion on this point is not settled. It is said that

> "one can only speculate on what these enterprises would make of the formal 'offer' and 'acceptance' provisions in Part II, or of the skeletal suppletory rules of Part III. They might conclude ... that they are protected by the formalism of the formation process and by the need to spell out most details of their agreement."[147]

(3) Enterprises faced with contract disputes. This audience group will be primarily concerned with the remedies available under the regime of CISG (*e.g.*, cure). CISG's alternative remedy provisions can be found in Part III of the Convention and are designed to preserve the community formed and to avoid threats of dissolution "by encouraging dialogue and reconsideration".[148] The basic theme in Part III CISG is that the contract should only be avoided as a last resort.

This diagrammatic treatment of the different potential audience groups to which CISG has to address its message of a unified international sales law completes the analysis into the nature of the community that is established by CISG. It remains to be seen whether CISG, through audience participation (*i.e.*, actual use, as opposed to mere ratification) can address satisfactorily the legal issues that concern its community with its substantive law provisions. The interpretation of CISG and its handling of these issues, through the operation of Article 7 CISG, is the key to answering the vital question of whether CISG will bring, and keep, together its

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[146] U.C.C. § 2-204 :

(a) A contract for sale may be made in any manner sufficient to manifest agreement, including offer and acceptance and conduct by both parties recognising the existence of the contract.
(b) If the parties so intend, an agreement is sufficient to make a contract for sale even if the moment of the making of the agreement is not determined, one or more terms are left open or to be agreed upon, or writings or records of the parties contain varying terms as defined in Section 2-207(a).
(c) If a contract for sale is made and one or more terms in the agreement are left open, the contract does not fail for indefiniteness if there is a reasonably certain basis for an appropriate remedy.

[147] Winship (1988), *supra* note 131, at 630.

[148] Winship (1988), *supra* note 131, at 630.

international community, the international legal consensus that its drafters hoped it would.

4. THE CONCEPT OF GOOD FAITH

Principles and rules commanding the observance of good faith and fair dealing in relationships governed by the law of obligations, in particular those created by contract, are common stock of most legal systems. The existence and use of general provisions and rules on good faith and fair dealing can also be found in legal texts aimed at the unification of certain sectors of private law for purposes of international transactions. Indeed, Article 7 CISG states:

> (1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and in the observance of good faith in international trade.
>
> (2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

For the purposes of this thesis, the element of good faith in Article 7 CISG is analysed in Chapters 3 and 4 of this work, *infra*, dealing with the concept's operation in CISG's interpretation (in the context of Article 7(1)) and in CISG's gap-filling mechanism (in the context of Article 7(2)), respectively. Bearing in mind the concept's double-role in CISG, as well as the concept's innate definitional difficulties, the present writer attempts in the current chapter an independent analysis of the concept which can yield certain results that can be used in the later analyses of the nature of all the functional elements in Articles 7(1) and 7(2) CISG, in Chapters 3 and 4 of this work, respectively. The present writer believes that this compact treatment of good faith is not only a more efficient, but also an easier way of analysing a concept whose overlapping reach into both 7(1) and 7(2) CISG is further complicated by certain important theoretical distinctions which the present writer needs to make and maintain clearly in the remaining chapters of this work in advancing his thesis on the interperetation of CISG.

The text of Article 7(1) CISG covers only the application of the Convention, rather than the parties' rights and obligations and their exercise and performance directly.

The wording was agreed upon only after lengthy discussions in the UNCITRAL Working Group and the plenary session of the Vienna Conference that adopted the text of CISG, and it was meant as a final rejection of more far-reaching proposals to apply the principle of "good faith and fair dealing" to the obligations and the behaviour of the parties themselves.[149] However, there is a strong body of academic opinion holding that the evaluation of the relations, rights and remedies of the parties, could also be subject to the principle of good faith and fair dealing. It is asserted that the principle of good faith, in addition to its interpretative role on the CISG provisions, has also found its way into CISG as one of its important general principles under Article 7(2) CISG.[150]

The concept of "good faith" is one of the most controversial ones for the users of CISG. The controversy relates not only to the exact function of the concept, but also extends to its the qualitative definition. In order to understand the complexity and the variety of connotations that the notion of "good faith" carries in different legal systems and the degree of difficulty that its definition can create, as well as learn from the experience of dealing with such a general yet important concept, we will examine the position of the concept in the English common law and the American law, with German law providing the civil law perspective on the issue *via* the principle of "*Treu und Glauben*" from the German Civil Code.

The benefits of this examination, apart from the comparative analysis that it will produce on the point, include a better comprehension of the tension that is created among different schools of legal thought when one attempts to unify the definition of important legal terms and prescribe new roles to them. This exercise can act as a paradigm for one's approach to CISG, since "good faith" is arguably the most disputed concept that CISG contains and interpreting it can not only influence greatly the scope CISG's operation, but it can also shape CISG's core character.

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[149] For the legislative history of the provision, *see* Bonell, *supra* note 113, comment 1.3 *et seq.*

[150] As to the possibility of using the principle of "good faith and fair dealing" on the basis of Art. 7(2) CISG as a rule for the contractual relations between the parties, *see* A. Farnsworth, "Duties of Good Faith and Fair Dealing under the UNIDROIT Principles, Relevant Conventions and National Laws", 3 *Tul. J. Int. and Comp. L.* (1995), 56; *see also* Bonell, *supra* note 113, comment 2.4.1 (p. 85): "Yet, notwithstanding the language used in Article 7(1), the relevance of the principle of good faith is not limited to the interpretation of the Convention. (...) if during the negotiating process or in the course of the performance of the contract a question arises for which the Convention does not contain any specific provision and the solution is found in applying, in accordance with Article 7(2), the principle of good faith."; J.Lookofsky, *Understanding the CISG in the USA* (1995), § 2-10 (p. 19): "And since other (very) general CISG principles of loyalty and reliance-protection have also been deduced, the

Despite the common existence and use of the concept of "good faith" in many developed legal systems there seems to be not one monograph which would report and compare in detail the various manifestations of the principle and its applications and understanding in the legal systems. Although there is a huge body of scholarship on certain aspects or applications of the principle in one or more legal systems, there seems to be not one comprehensive and exhaustive treatment. The recognition of this has led Professor Schlechtriem to conclude that the importance of the general principle of "good faith and fair dealing" and the details developed out of it depend on the structure and content of the specific legal system in which they are implemented, and on the concrete and specific contract in question.[151] In other words, as a domestic legal concept, the principle of "good faith" is used and developed according to the specific needs of a national legal system or of a particular contract. This observation entails the consequence that in defining "good faith" in CISG, the domestic experience of the concept is of limited practical value. This realisation should not cast undue doubt on the purposes of our comparative analysis of the concept of "good faith". The purpose of the exercise remains valid because the experience gained by the domestic use of the concept of "good faith" and its distinctive – albeit diverse – development in different legal systems can throw light on the multi-faceted nature of the term and its potential to acquire different roles, although it should not prescribe its international journey.

(a) The concept of "Good Faith" in English Law

The starting point of any discussion of the notion of "good faith" in English law must be the declaration that there is no general doctrine of good faith in English contract law.[152] As has been explained more eloquently elsewhere, this is not because English law rejects the good faith ethic; rather, English law prefers to work out solutions to contractual problems at a more detailed level of legal rules.[153]

This position is in stark contrast with the trend of the clear emergence, if not dominant presence, of the principle in modern international legal instruments. Perhaps the best example of this development is provided by the UNIDROIT

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deduction of a general Convention principle requiring the parties to act in good-faith seems no great leap, even if it does seem to fly in the face of the *traveaux preparatoires*."

[151] *See* P. Schlechtriem, "Good Faith in German Law and in International Uniform Laws", in Centro di studi e ricerche di diritto comparato e straniero (diretto da M.J. Bonell), *Saggi, Conferenze e Seminari* (Rome 1997) No. 24.

[152] Contrast this to the American position: United States Restatement (2nd) on Contracts, para 205.

Principles, where the principle of good faith and fair dealing arises "in international trade" and not just in the performance and enforcement of contracts. [154] Another clear demonstration of the ever-increasing importance attributed to good faith can be found in the current draft of the Lando Principles, where the duty extends also to negotiations between the parties.[155] Such a development has not been followed in English law. In fact, the House of Lords, fairly recently, reinforced the absence of good faith in contractual negotiations. Specifically, in the case of Walford v. Miles [1992] 2 A.C. 128, the House of Lords refused to impose a duty to negotiate in good faith on the parties engaged in the complex, protracted and inherently adversarial process of negotiating towards the sale of a business.

Notwithstanding this clear rejection of the general principle of good faith, good faith in the negotiating process is advanced by indirect means in English law. For example, the tort of breach of confidence protects confidential information acquired by the parties during their negotiations from exploitation after the breakdown of negotiations.[156] Another instance where English law offers specific protection, without resorting to the general principle of good faith, is found in the observance of fairness and equality in the tendering process leading to the award of a major construction contract. The system of bidding may give rise to a pre-contract embodying these principles and a remedy for their infringement.[157]

It can be deduced from the above illustrations of English law that lawyers brought up in the tradition of English law, the present writer included, find it difficult to adopt a general concept of good faith. To explain the reasons for the resistance of English law towards the adoption of a general concept of good faith, as well as the modern emergence of qualifications to such resistance, we need to make a quick historical sojourn in the development of the English common law itself. It is a truism to say that the better one's grasp of the historical development of an area of law, the better one's understanding of the modern law. Certainly this is true of the law of contract.

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[153] *See* M.G. Bridge, "Does Anglo-Canadian Law Need a Doctrine of Good Faith?" 9 *Canadian Business L.J.* (1984) 385-426.

[154] Article 1.7 UNIDROIT Principles of International Commercial Contracts, *see* UNIDROIT (ed.), *Principles of International Commercial Contracts* (1994) 15.

[155] Article 1:201.

[156] Seager v. Copydex Ltd. (No. 2) [1969] 1 W.L.R. 809.

[157] Blackpool and Fylde Aero Club Ltd. V. Blackpool Borough Council [1990] 1 W.L.R. 1195.

Yet no attempt at a full historical introduction is made here. Detailed accounts of the development of the modern law of contract in English law exist aplenty.[158]

The old *lex mercatoria*

In the days of the old *lex mercatoria*, that accumulation of mercantile customary law administered by the merchant courts where the merchants themselves were judges, there existed a general concept of good faith.[159] As was described in the first chapter of this work, merchants would travel across Europe to the international fairs and they themselves would resolve in a rapid, businesslike fashion any commercial disputes. In those days there existed to some extent a relatively uniform, albeit uncodified, commercial law based on commercial custom and practice – quite separate from the ordinary common law administered by the King's courts – and one of these customs was good faith. With the gradual disappearance of the merchant courts, their jurisdiction was incorporated into the royal courts, and the principles of the law that had been applied by the merchant courts for centuries became absorbed into the common law. Since the English common law does not have a civil Code or a commercial Code, when the common law courts took over the jurisdiction of the old merchant courts, the principle of good faith disappeared for a while. This does not, of course, represent modern English law, but it gives an indication that English law used to take a fairly extreme position on the duties of parties to look after themselves in the tough world of business.[160]

Assumptions of the modern common law of contract

The modern English law of contract assumes freedom of contract; it assumes

> "a paradigm situation of one-to-one negotiation of all the terms of the agreement by parties of equal bargaining strength concerned to maximise their individual positions."[161]

It must be recognised though that in many situations these assumptions are frequently contradicted or qualified and adjustments made in the application of the

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[158] *See* C.H.S.Fifoot, *History and Sources of the Common Law*, (Stevens & Sons, London, 1949), pp. 217ff; A.W.B.Simpson, *A History of the Common Law of Contract*, (1975); J.Baker, *An Introduction to English Legal History*, (2nd ed., 1979), esp. Chs. IX, X and XVI; S.F.C.Milsom, *Historical Foundations of the Common Law*, (2nd ed., 1981), esp. Chs. 10-12.

[159] On the topic of "Good Faith in English Law", *see* the small but beguiling essay of R.Goode, "Good Faith in English Law", Centro di studi e ricerche di diritto comparato e straniero (diretto da M.J. Bonell) *Saggi, Conferenze e Seminari* (Rome 1992) 2. On the existence of a good faith notion in the old *lex mercatoria*, *see* p.1 of the same essay (N.B. The pagination is the present writer's own, as the essay is located in the Pace University website, where no official pagination exists).

[160] *See* Goode, *ibid.*

[161] J.W.Carter and D.J.Harland, *Contract Law in Australia*, 2nd ed., (Butterworths, Sydney 1991) 7.

principle based on these assumptions. A qualification to the paradigm situation that is of interest to our discussion is the proposition that "will" and "intention" form the substratum of every contract. This proposition is heavily attenuated by inequality of bargaining power between the contracting parties.

Leading Australian scholars Professors Carter and Harland have encapsulated the essence of the common law contract origins – and modern problems – in one sentence:

> "The basic principles of contract law were laid down in an economic, social, political and intellectual context different from to-day's. They were developed under the influence of the forces of individualism, competitiveness, laissez-faire, an intellectual climate characterised by a high regard for general principle, and economic dominance of a free market economy."[162]

This common law theory of contract has attracted ever-growing criticism. Atiyah has observed that

> "although freedom of contract is by no means dead in the law courts, even among lawyers the decline has been evident".[163]

Professor Gilmore, in what he describes as a "study in what might be called the process of doctrinal disintegration",[164] has argued that the general theory of contract in the common law is an artificial construct derived by nineteenth century law teachers and judges rather than something truly to be found in the reasons for decision in the major contract cases from which they drew support.[165]

Most of the above criticisms leveled against the rigidity of the common law theory of contract and the reluctance to incorporate a clearly defined concept of good faith, stem from the original "objective theory of contract",[166] which has been the foundation of all contract theory in common law and the concomitant resistance shown by common law to interfere with the operation of the bargain struck between the parties. The incorporation of a general concept of good faith has been resisted by English law because it would unsettle the certainty of the contractually agreed terms by introducing new and abstract conditions absent from the objectively struck bargain. The primary emphasis of the law of contract in English common law is on

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[162] Carter & Harland, *supra* note 161, at 10.
[163] P.S.Atiyah, *The Rise and Fall of Freedom of Contract*, (1979), p.716.
[164] G.Gilmore, *The Death of Contract*, (Ohio State University Press, 1974), p. 101.
[165] *Ibid.*
[166] For a recent illustration of this doctrine, *see* Furness Wilrhy (Australia) Pty Ltd v. Metal Distributors (UK) Ltd (The Amazonia) [1990] 1 Lloyd's Rep. 236, at 243.

the objective interpretation of a party's words and conduct, rather than the party's subjective state of mind, intention or motive. Blackburn J. in Smith v. Hughes[167] produced a well-known formulation of that theory:

> "If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into a contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."

Today there is undoubtedly a tension between classical contract theory and the reality of contract bargaining. Indeed, a requirement of good faith in contract negotiation has begun to emerge[168] due to the realisation that contract law today is more complex than in the nineteenth century. As a reflection of the change in society's perception of the strength of the moral presumptions that dominated the classical theory of contract law in the common law jurisprudence, courts have become more pragmatic in their decisions. As English law develops, courts abandon their former strict, non-interventionist stance in contractual disputes by reducing the rigour of the *caveat emptor* rule in the sale of goods and impose certain duties of good faith in a range of situations. It must be noted here that the present writer does not treat the diminution of the *caveat emptor* rule and good faith as the same thing, nor does he advance a causal connection between the two developments. Simply, the point is made that as strict compliance to the former is being relaxed, heavier reliance to the latter seems to be gaining momentum. The question of whether this ascertainment is the result of a mere historical coincidence, or belies a closer relationship between the two trends, is outside the scope of this thesis. What is certain is that today English law does have a concept of good faith, albeit a limited and fragmented one, or, at least, a series of exceptions and qualifications to its orthodox contract doctrine that resembles good faith. For example, English law treats a person as acting in good faith if he acts honestly, even if he is negligent or even unreasonable. Thus, section 61(3) of the Sale of Goods Act 1979 provides:

> "A thing is deemed to be done in good faith within the meaning of this Act when it is in fact done honestly, whether it is done negligently or not."

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[167] (1871) LR 6 QB 597, at 607. For a re-affirmation of acceptance of this principle in Australia, *see* Taylor v. Johnson (1983) 151 CLR 422.

[168] *See* R.Powell, "Good Faith in Contracts" [1956] *CLP* 16. *See also* Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd. [1989] QB 433, at 439.

However, English law does not have anything equivalent to the general concept of good faith found in the civil law; what is required is good faith (or, if you prefer, a concept that bears many attributes similar to those of good faith) in particular situations.

Silence and concealment of facts

For example, a party who opens negotiations leading to a contract has a duty not to deceive the other party by false statements or by any concealment of facts. Being silent on some issues is allowed,[169] but if a misrepresentation is established, the representee may rescind the contract *ab initio*, subject to certain limitations. At common law this right was only available in the case of fraudulent misrepresentation or cases involving total failure of consideration,[170] but Equity extended the right to all cases.

Damages for breach of contract are necessarily excluded, unless the false statement is also a term of the contract. A remedy for damages may, however, be conferred by the law of tort or by statute.

Fiduciary relationships & bad faith performance

Perhaps it is more important to note that English law imposes a general duty of good faith in particular types of contractual relationships. In certain contracts, performance which is in not in good faith may constitute a breach.[171] An agent owes a duty to subordinate his own interests to those of his principal, must not accept secret commissions, nor promote his own interest over that of his principal, and he must keep his principal informed of all facts that are relevant to the relationship. Likewise, a company director owes a duty of good faith to the company that employs him and a trustee a duty of good faith to his beneficiary.[172]

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[169] Arkwright v. Newbold (1881) 17 Ch.D. 301, where James L.J., at 317-8, insisted on "some active misstatement of fact, or, at all events, such a partial and fragmentary statement of fact as that the withholding of that which is not stated makes that which is stated absolutely false". However, in some special classes of contracts positive disclosure is required, particularly in contracts *uberrimae fidei*, such as insurance contracts; *see* Khoury v. Government Insurance Office of NSW (1984) 165 CLR 622.

[170] Common law courts applied a strict rule of precise restitution and rescission was not permitted for innocent misrepresenation except where the misrepresentation was so fundamental that the party misled could establish a complete difference in substance between what was supposed to be and what was in fact supplied; *see* Brownlie v. Campbell (1880) 5 AC 925, at 937 per Lord Selborne LC.

[171] *Cf.* H.K. Lucke, "Good Faith and Contractual Performance" in Finn, ed., *Essays on Contract*, (1987), p. 155.

[172] Contracts of employment frequently contain an implied obligation of good faith or fidelity; *see* Faccenda Chicken Ltd. v. Fowler [1987] Ch 177.

Duties of good faith are also required if the court is asked to grant "equitable remedies". The subject matter of this thesis does not allow extensive digressions into the peculiar distinction that the English law system draws between law and equity.[173] It is sufficient to say that the rules of Equity – originally administered in the King's Court by the Chancellor – evolved in order to undo the injustices frequently caused by the rigidity of the old common law, either by restraining common law remedies, or by giving remedies which were not given by the old common law, such as specific performance or rescission of a contract for a non- fraudulent misrepresentation. In order to invoke these remedies an applicant must come to the court "with clean hands", which requires among other things that the plaintiff shall have acted in good faith.

Contractual negotiations

However, in some cases, good faith is not relevant in English law where it is probably relevant in other continental legal systems. One of them is the case of precontractual negotiations between parties. English law has never adopted Jhering's principle of *culpa in contrahendo*. English law does not recognize that the opening of negotiations for a contract by itself creates any sort of duty relationship. The view taken is that both parties are at risk until a contract is actually formed. Therefore, English law sees no culpability in a party who is conducting negotiations arbitrarily breaking them off, even if he has brought the other party to the brink of formation of the contract, or in a party conducting negotiations in parallel with several parties, without telling any party that he is negotiating with the others.

The reason English law takes this view is that when parties are invited to enter into negotiations, they do so with the knowledge that this involves a measure of competitive risk. Of course, it is different if one party invites another to enter into negotiations when the first party has no intention of ever concluding a contract with the other at all. That is dishonesty and even English law would give a remedy, but not under the heading of good faith.

One reason for the rigorous approach adopted by English law towards the observance of contractual undertakings is the view that the legal certainty and predictability of the legal outcome of a case are paramount values in common law. The prevailing

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[173] For an excellent treatment of the history and principles of Equity, *see* R.P.Meagher, W.M.C.Gummow, J.R.F.Lehane, *Equity Doctrines and Remedies*, 3rd ed., (Butterworths, Sydney 1992).

concern in English law is that if courts become too ready to disturb contractual transactions, then merchants will not know how to plan their business life. The position of English courts is that vague concepts of fairness can make judicial decisions unpredictable. If that means that the outcome of disputes is sometimes hard on a party then it is regarded as an acceptable price to pay in the interest of the great majority of business litigants. The prevalent view of scholars upholding the orthodoxy of English contract law is epitomised by Professor Bridge, who argues that a general doctrine of good faith is unnecessary and liable to cause trouble because it is too vague and gives too much power to the individual judge freed from the disciplined traditions of contract law.[174] Professor Bridge is of the opinion that it is better to confront particular problems, as English law has done so far, than to adopt a general ethical imperative, as the purpose of legislation should not be to make a moral demonstration.[175]

This view gains strength from the fact that in many cases English law arrives at the same answers as continental law systems, but by a different route. There are numerous situations in which English law does not find it necessary to require good faith because it imposes a duty which does not depend on good faith. For example, if a party is induced by a wrong statement to enter into a contract, in some cases he can rescind it even if the other party made the statement entirely honestly and unaware of the falsity.[176]

Again, if a party suffers loss through a breach of contract, and fails to take reasonable steps that would operate to mitigate his loss, he cannot recover damages to the extent that he could have avoided his loss.[177] This is not a rule of good faith, it is simply a strict rule, which states that to the extent that the plaintiff has brought his misfortune on himself he cannot look to the defendant for compensation.

Also, a seller of goods which are defective, or otherwise not in conformity with the contract, can face liability not because he did not disclose the defects, nor because he acted in bad faith, but simply because he did not supply what he contracted to

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[174] *See* Bridge, *supra* note 153.

[175] M.G.Bridge, "Good Faith in Commercial Contracts" in *Good Faith in Contract: Concept and Context* (eds R Brownsword and G Howells) (Dartmouth 1999) 139.

[176] Common law gave no remedy for pre-contract innocent misrepresenations as distinct from fraudulent ones. There was an exception where the misrepresentation was as to a matter so fundamental that the party misled could establish a complete difference in substance between what was supposed to be and what was in fact supplied; *see* Brownlie v. Campbell (1880) 5 AC 925.

[177] *See, e.g.*, British Westinghouse Electric and Manufacturing Co Ltd v. Underground Electric Railways Co of London Ltd [1912] AC 673.

supply.[178] Just how different the goods supplied must be to the goods ordered can be debated, but it is sufficient for present purposes merely to state the issue.

Finally, a person who negligently fails to disclose dangerous defects in a product he is supplying is liable in tort for injury caused by the product to the person to whom it is supplied, and again the question of good faith does not matter: liability can be established in tort for negligence.

Professor Bridge has shifted the focus of the theoretical debate on good faith from the question of whether contract law needs a general standard of good faith to the question of whether there are deficiencies in the existing law that cannot be adequately resolved without the introduction of good faith.[179] The above notes are evidence of the fact that certain problems can be solved in English law without necessarily resorting to a general principle of good faith. The present writer believes that this argument has the strength of jurisprudential rationality in a difficult theoretical debate with potentially drastic effects on English contract law as we know it. However, there is no denial that good faith, rightly or wrongly, is not only in the air, but also in new legislation. It is explicitly present in the language of the Unfair Terms in Consumer Contracts Regulations (1999), implementing the European Community Directive on Unfair Contract terms in Consumer Contracts,[180] although it is likely to be translated into the language of "reasonableness", which is familiar to English lawyers due to its inclusion in the Unfair Contract Terms Act (1977).

(b) The concept of "Good Faith" in American Law

There is a need to point out some important differences between the American and the English common law systems regarding good faith. In the American common law there has been a generally accepted concept of good faith for decades.[181] Americans have not only a widely adopted Uniform Commercial Code, but also have a Restatement (now a Second Restatement) of Contracts. Both the Uniform Commercial Code and the Second Restatement impose on parties to a contract an obligation of good faith. Section 1-203 of the Code[182] provides that

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[178] Chanter v. Hopkins (1838) 4 M & W 399; 150 ER 1484.

[179] *See* Bridge (1999), *supra* note 175.

[180] 93/13/EEC.

[181] For a concise and thorough discussion of the American position on good faith, *see* A. Farnsworth, "The Concept of 'Good Faith' in American Law" in Centro di studi e ricerche di diritto comparato e straniero (diretto da M.J. Bonell), *Saggi, Conferenze e Seminari*, (Rome, 1993) No. 10.

[182] An interesting fact is that the principal author of the Code, Professor Karl Llewellyn, had studied and taught in Leipzig (Germany) and was familiar with the German concept of *Treu und Glauben*

> "every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."

And Section 205 of the Restatement, which was drafted later than the Code and was inspired by the Code, declares that

> "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement."

We should note two things about the scope of these provisions. First, neither one says anything about a doctrine of good faith purchase as opposed to good faith performance.[183] Second, these provisions omit any reference to good faith in negotiation as opposed to good faith in performance. That is because, like most of the common law world, American lawyers do not recognize a duty of good faith in precontractual negotiations.[184]

However, American lawyers, unlike English lawyers, are not lacking in definitions of good faith. Even the Uniform Commercial Code has not one but two definitions of good faith that apply to contracts for the sale of goods. Under the general definition in Section 1-201(19)

> " 'Good Faith' means honesty in fact in the conduct or transaction concerned."

This is the definition traditionally used for good faith purchase, which the Code makes applicable to good faith performance as well. Under the special definition in Section 2-103 applicable to merchants in sales transactions

> " 'Good Faith' . . . means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade."

Professor Farnsworth has argued that the duty described by the Restatement encompasses not only "good faith", but also "fair dealing". According to his view, the addition of fair dealing makes this definition particularly suitable for good faith performance since he argues that while good faith – in the sense of honesty – is entirely suitable for good faith purchase, fair dealing is a term better suited to performance.[185]

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when he introduced "good faith" into the American Code; *see* W. Twining, *Karl Llewellyn and the Realist Movement* (1985), p. 312.

[183] For a discussion on bad faith performance, *see* the English position stated earlier in this chapter, *supra*.

[184] Note however, that in American law, as in English law, there are other concepts that often serve as a substitute for good faith in precontractual relations.

[185] Professor Farnsworth comes to this conclusion through a demonstration of issues pertaining to the question of good faith in a hypothetical contract in his essay, *supra* note 181, at 3. (N.B. The

Good Faith: Implied Terms, Excluders and Foregone Opportunities

The fact that American law has statutory definitions of "good faith" does not mean that American lawyers are in complete agreement as to what "good faith" means in the context of good faith performance. Three scholars who have written on the subject have stressed three different aspects of good faith performance.

In the first major article on the subject after the enactment of the Uniform Commercial Code, Professor Farnsworth observed that the duty of good faith performance can be the source of what common lawyers would call an implied term and suggested that the Code's duty of good faith performance might serve as a basis for implying a wide range of terms in a contract.[186] This suggestion has received some judicial approval in America.[187]

In the second major article on the subject, Professor Robert Summers stressed a different role for good faith, arguing that good faith is one of those terms that do not have a general positive meaning of their own but function instead as "excluders", to rule out various things according to context. Under this formulation, the effect of the doctrine of good faith would be to rule out those types of improper behaviour that should be regarded as bad faith performance. Professor Summers noted that

> "in cases of doubt, a lawyer will determine more accurately what the judge means by using the phrase 'good faith' if he does not ask what good faith itself means, but rather asks: What, in the . . . situation, does the judge intend to rule out by this use of this phrase."[188]

Professor Summers listed, as excluded by the phrase "good faith", the following situations:

> "evasion of the spirit of the deal, lack of diligence and slacking off, willful rendering of only substantial performance, abuse of power to specify terms, abuse of a power to determine compliance, and interference with or failure to cooperate in the other party's performance."[189]

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pagination is the present writer's own, since the essay was accessed in its unpaginated electronic form at the Pace University website: www.cisg.law.pace.edu).

[186] A.Farnsworth, "Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code", 30 *U. Chi. L. Rev.* (1963) 666, at 679.

[187] *See* Tymshare v. Covell, 727 F.2d 1145 (D.C. Cir. 1984), *per* Scalia J.

[188] R. Summers, "'Good Faith' in General Contract Law and the Sales Provisions of the Uniform Commercial Code". 54 *Va. L. Rev.* (1968) 195, at 200.

[189] *Ibid.*, at 232-33.

This kind of definition by exclusion has not only found favor with a number of courts,[190] but is also reflected in the comments to the Second Restatement's section on the duty of good faith performance.[191]

In the third major article on the subject, Professor Burton expressed his disappointment that

> "neither courts nor commentators have articulated an operational standard that distinguishes good faith performance from bad faith performance."[192]

Professor Burton attempted to fashion a standard based on the expectations of the parties, arguing that good faith "limits the exercise of discretion in performance conferred on one party by the contract". Under this formulation, it would be bad faith to use discretion "to recapture opportunities forgone in contracting" as determined by the other party's reasonable expectations, or to refuse "to pay the expected cost of performance."[193] As in the case with the two other views discussed above, this definition of good faith in terms of forgone opportunities has also found favour with a number of courts.[194]

Professors Summers and Burton have engaged in a lively debate in which each criticizes the other's views. Summers argues that Burton's "foregone opportunities" analysis is "not necessarily any more focused" than the excluder analysis in a novel good faith performance case.[195] On the other hand, Burton faults the Summers "excluder" analysis as implying that courts "typically use the doctrine to render agreed terms unenforceable or to impose obligations that are incompatible with the agreement reached at formation", rather than to "effectuate the intentions of the parties".[196]

Adding to the debate, although not clarifying it, American courts have often cited all three views – Farnsworth's, Summers' and Burton's – indiscriminately, as if they

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[190] *E.g.*, Best v. United States National Bank, 739 P.2d 554 (Or. 1987).

[191] *Restatement, Second, of Contracts* § 205, Comment *d*. The comment notes that "a complete catalogue of types of bad faith is impossible . . ." and goes on to give a list very similar to that provided by Professor Summers.

[192] S.Burton, "Breach of Contract and the Common Law Duty to Perform in Good Faith", 94 *Harv. L. Rev.* (1980) 369. *See also* S.Burton, "Good Faith Performance of a Contract Within Article 2 of the Uniform Commercial Code", 67 *Iowa L. Rev.* (1981) 1.

[193] Burton (1980), *supra* note 192, at 372-3.

[194] *E.g.*, Richard Short Oil v. Texaco, 799 F. 2d 415 (8th Cir. 1986).

[195] R.Summers, "The General Duty of Good Faith – Its Recognition and Conceptualisation", *67 Cornell L. Rev.* (1982) 810.

[196] S.Burton, "More on Good Faith Performance of a Contract: A Reply to Professor Summers", *69 Iowa L. Rev.* (1984) 497, 499.

were entirely consistent with each other.[197] Professor Farnsworth, analysing some recent American cases involving satisfaction clauses, has attempted to reconcile these three views and concluded that courts have been right to regard all three views as cumulative and consistent and to avoid taking sides in the scholarly debate between Professor Summers and Burton.[198]

From this American debate about the role of the duty of good faith performance we can deduce the following. First, in accordance with Farnsworth's view in his early article,[199] the duty of good faith performance can be the source of what common lawyers would call an implied term – a duty that would be supplied by a court to specify the grounds for party's dissatisfaction in the contract. Second, in accordance with Professor Summers' view, the duty of good faith performance would be the basis for holding a party in breach of contract if that party's claim of dissatisfaction is a subterfuge or pretext to avoid performance of the contract for some other reason. Third and finally, in accordance with Professor Burton's view, the duty of good faith performance can provide the grounds for controlling the parties' exercise of the discretion that they have under the contract. But this is a theoretical debate that has mainly attracted scholarly interest and has not greatly troubled judges and lawyers. However, a debate that has assumed more practical importance concerns the question whether good faith is purely subjective – requiring only that a party "honestly" believe that it is acting properly – or objective – requiring that a party in addition act in a "reasonable" manner.

The definitions of good faith endorsed by some American courts are abstract and often so sweeping as to be of little help in determining the proper standard. For example, it has been said that the duty of good faith performance compels each party

> "to do nothing destructive of the other party's right to enjoy the fruits of the contract and to do everything that the contract presupposes they will do to accomplish its purpose."[200]

It is not clear whether this is an objective or subjective standard of good faith. It is certain that the standard is not as demanding as the standard of good faith imposed on agents and other fiduciaries. Thus, it has been said that

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[197] *E.g.*, Foley v. Interactive Data Corp., 765 P.2d 373 (Cal. 1988) (*citing* both Summers and Burton).
[198] *See* Farnsworth (1993), *supra* note 181, at 5.
[199] *See* Farnsworth (1963), *supra* note 186, at 679.
[200] Conoco v. Inman Oil Co., 774 F.2d 895, 908 (8th Cir. 1985).

> "A duty of good faith does not mean that a party vested with a clear right is obligated to exercise that right to its own detriment for the purpose of benefiting another party to the contract."[201]

But even this formulation does not help clarify whether good faith is to be judged solely by the traditional subjective standard of honesty or also by an objective standard of reasonableness.

If the duty of good faith were taken to include a component of fair dealing, as judged by those in similar activities, this would incorporate an objective standard. This seems to be in line with Article 2 of the Uniform Commercial Code, which imposes on a merchant a duty of good faith that includes

> "... the observance of reasonable commercial standards of fair dealing in the trade." [202]

Under this provision, courts may consider the testimony of witnesses familiar with the behaviour of others in the trade in order to determine whether a party has passed the objective test of "reasonable commercial standards of fair dealing" in that trade. In a case involving a merchant buyer of goods (plane fuel) and a major oil corporation, the federal district court noted the established industry practice that had long been part of the established courses of performance and dealing between the parties, and held that the buyer had not breached its duty of good faith under the contract, applying on the buyer the Code's definition of good faith:

> "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade."[203]

The buyer had behaved fairly according to the understanding of the parties based on their longtime relationship and on the understanding of others in the trade.

The above discussion of the concept of good faith in English and in American law hints that English law may also be more receptive to the principle of good faith performance in the future. The acceptance of the doctrine by common law jurisdictions in the United States and the ratification by many common law countries of CISG are evidence that such a development is not as unlikely as it initially sounds.

The development of the concept of good faith in the common law world has proved the vitality and potential energy of the doctrine. Our discussion of English and American jurisprudence has shown that even among related common law systems the

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[201] Rio Algom Corp. v. Jimco Ltd., 618 P.2d 497, 505 (Utah 1980).

[202] *See* the special definition of good faith in Section 2-103 U.C.C., applicable to merchants in sales transactions.

[203] Eastern Air Lines, Inc. v. Gulf Oil Corp., 415 F. Supp. 429 (S.D. Fla. 1975).

concept of good faith does not enjoy uniformity in interpretation or application. It is hoped that this examination of good faith in the above common law systems[204] highlighted the non-uniform development of the concept even among different jurisdictions of the same legal tradition. Trying to unify the content and scope of good faith at the international level poses even greater difficulties, since the principle of good faith has endured an equally distinctive, albeit very different, development in civil law systems.

(c) The concept of "Good Faith" in German Law

In the German Civil Code (BGB), which came into force on January 1, 1900, the observance of *"Treu und Glauben mit Rócksicht auf die Verkehrssitte"* ("good faith and fair dealing") – embodied in such general provisions as §§ 157, 242 BGB, but also repeated throughout the code in more specific contexts – has become a legal principle of pervasive influence in German civil law.[205]

Professor Schlechtriem notes the abundance of cases, theories, detailed rules and sub-rules that have emerged from § 242 BGB, since court decisions and scholarly theory have applied the principle of *Treu und Glauben* under German law to almost every situation governed by the Civil Code (in addition to the interpretation of particular contracts under § 157 BGB), very often overriding the text and the meaning of special provisions.[206]

The present writer believes that Professor Schlechtriem's statement is indicative of the reductionist impact that good faith can have on the law. A similar result for CISG would surely be unwanted and the German experience with a general clause like this clearly points to the need to develop barriers to the unmanageable or anarchic use of Article 7 CISG.

Many German scholars, in an effort to define the meaning and function of § 242 BGB more clearly, make a distinction between the functions and the values of the provision.[207] This distinction can also be helpful in understanding how principles of good faith might work in the context of a legal text like CISG.[208]

The Functions of *Treu und Glauben*

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[204] The present thesis does not pretend to cover the concept of good faith and its jurisprudential journey in common law exhaustively; such treatment would require a separate thesis.

[205] *See* Schlechtriem (1997), *supra* note 151.

[206] *Ibid.*, at 5 (NB. This reference is based on the present writer's own pagination, since the essay was retrieved from Pace University's internet website without an official pagination).

[207] *E.g.*, Franz Wieacker, *Zur rechtstheoretischen Prazisierung des § 242*, (Tübingen, 1956), S. 20 ff.

To understand the functions of such a principle, one must ask what was the legislator's intention originally and where and with what intent was the principle employed by courts subsequently.

1. The first level of the principle's function concerns instances where it would overburden a code to deal with all possible and imaginable fact situations; even the most detailed code or contract can not deal with every issue imaginable, so details of minor importance can be left to the courts: *Minima non curat praetor*. According to Professor Schlechtriem, this was the function the German legislator attributed to §242 BGB, and no more.[209]

2. The second level of *Treu und Glauben*'s function is to fill larger gaps or to clarify meanings left uncertain by the drafters of the code, or of the contract. Such gaps can arise unintentionally and usually concern provisions, which after their enactment have come to be regarded as too narrow, too unclear, wrong, or outdated. However, the *Treu und Glauben* concept is also used to fill a gap in the code that exists because the drafters were either uncertain, or could not agree upon one of several solutions, by clarifying the meaning of the relevant provision.

3. The gap-filling function of the *Treu und Glauben* under § 242 BGB is mostly used to imply and implement obligations that are needed to complete the duties and obligations in a given contract, although such obligations were neither agreed by the parties in their contract nor laid down in the applicable provisions of law. Such obligations will also be implied to ensure the performance of the main obligations of the parties in an international sales contract, either directly by Article 7(1) CISG, or by the gap-filling role of Article 7(2) CISG.

The German courts have also based contractual duties of care on § 242 BGB. These are duties of care to protect the life, personal property and economic assets of the parties and bear a close resemblance to duties of care under tort law in common law. They were developed as implied obligations in contracts in order to cure deficiencies of German tort law (*e.g.* in regard to the burden of proof of negligence and vicarious liability).[210] It is unlikely that the concept of good faith in Article 7 CISG has such far-reaching ambit.

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[208] The following analysis is outlined more thoroughly by Professor Schlechtriem, in Schlechtriem (1997), *supra* note 151.

[209] *See* Schlechtriem, *ibid.*, at 6.

[210] *See* Schlechtriem (1997), *supra* note 151, at 9.

4. An additional function that *Treu und Glauben* performs in Germany is to create a right to an adjustment of contracts because of a change of circumstances. This was introduced by the German Imperial Court in the twenties on the basis of § 242 BGB. So, good faith and fair dealing can be the basis of new remedies, not foreseen in the German code or the contract. The CISG, though, lacks a comparable solution, and there is no indication that its drafters contemplated such a remedial role for good faith.

The Values and Standards of *Treu und Glauben*

The discussion of the function of good faith in German law only covered one part of the bipartite distinction that German scholars have drawn in their analysis of *Treu und Glauben*. To complete our discussion of the principle, we must now focus on the issue of the values and standards which are used in the principle's application in a specific situation. During this discussion we must again keep in mind the distinction between interpretations and results within a national context on the one hand and the international setting of CISG on the other, as well as the distinctions among the various national values and attitudes regarding the principle of good faith.[211]

In Germany, the values and standards used in such general principles as *Treu und Glauben* (or: *contra bonos mores*, *sittenwidrig*) are derived from three distinct sources within the German legal order.[212] The highest level and the most important set of values are found in the German Constitution. Constitutional rights are afforded protection even in private dealings and contracts; and this is achieved technically through the means of a general clause such as § 242 BGB and the principle of *Treu und Glauben*. There is nothing comparable to this in the legal order surrounding CISG. In fact, CISG seems, from one angle, to be floating in a legal vacuum and without any "hard law" structures around it to provide support. Unfortunately, but unavoidably, CISG can not enjoy the support of a general contract law, as there is none at the international level. The relationship of CISG to the UNIDROIT Principles and other international legal instruments or pronouncements certainly can not be compared with the respective relationship of the German Civil Code to the German Constitution.

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[211] What might be permissible or conforming to good faith and fair dealing in, say, a developing country might be regarded as intolerable in a developed country and *vice versa*.

[212] *See* Schlechtriem (1997), *supra* note 151, at 11-13.

The values of the good faith principle in Germany may also be derived from other parts of the legal order, including the Civil Code itself. The structure and substance of the provisions of the Code depict the methodology and values used by the legislator to solve specific problems and the general principles upon which such a solution is based. These evaluations allow inferences as to more general values and standards, which can be used to interpret *Treu und Glauben* itself. A similar process can exist to define the value or standard of good faith in CISG and is in fact promoted in the wording of Articles 7(1) and 7(2) CISG.

Finally, another important level of values and standards of *Treu und Glauben* is not attributable to a specific legal act or theory but can be described as collective conviction; standards that every reasonable human being would regard as fair and decent.

It is difficult to define the mores of a whole community, and although the courts claim they express the community standards, it cannot be denied that there is a real danger that a general clause like *Treu und Glauben* may be abused by judges to exercise personal prejudices and biases. On the other hand, the community of CISG is a specific one – that of international merchants. This fact works in its favour since it focuses the question of "community standards" on a specific group of people engaged in a specific activity. Furthermore, Article 7(1) CISG contains an important limitation in that it expressly directs the search for the standards for good faith and fair dealing to "international trade". This provision rejects values based on national constitutions or derived from a national code of obligations, and renders most national judgements based on domestic convictions of what constitutes good faith and fair dealing almost useless. Domestic standards may be taken into account only to the extent that they are shown to be generally accepted among the various legal systems and therefore can be regarded as international.

Some further assistance on this issue is provided by the definition of international usages in Article 9(2) CISG, which restricts the implication of an agreement of the parties to those usages, which

> "in international trade are widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned."

Essentially, what Article 9(2) CISG states on usage standards – and what one must look at when defining the standard of good faith in CISG – is that such standards

must be explored in a given case and have to take account of the particular relationship of the parties.[213]

The definition of the standard of good faith in CISG – as with the application of *Treu und Glauben* in German law – will be developed incrementally as various courts and tribunals decide on the issue, until a generally held conviction is eventually formed among the members of the CISG community. In forming such a generally accepted definition of good faith, what will have to be overcome are not only domestic convictions as to what good faith and fair dealing means but also national views of what good faith and fair dealing in *international* trade is.

As stated earlier in the current chapter of this work, the concept of good faith is arguably one of the most important and difficult notions in CISG and its definition will go a long way towards settling the fate of CISG itself. The problem of the definition of good faith in international trade as provided in CISG is set. Knowledge of the potentially grave dangers hidden in the problem must make everybody involved in the development of CISG (*i.e.*, merchants, lawyers, judges, arbiters) wary of the difficult but important parameters required for its solution. The solution will involve a transitional period – hopefully not an indeterminate or fatally long one – of overcoming the natural tendency of homeward interpretations.

5. GOOD FAITH AND THE CISG

As was highlighted above, "good faith" is a concept that plays an important role in the interpretation and the application of CISG. It is a legal notion loaded with meaning and it has provided much of the debate surrounding CISG in general, as well as Article 7 CISG in more depth.[214] Having examined the function and standard of the concept of good faith in some national legal systems, let us now examine the operation of the concept within CISG.

The textual reference to the concept of "good faith" in Article 7(1) CISG reads as follows:

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[213] This may require the help of neutral experts; *e.g.*, the International Chamber of Commerce can assist in determining established trade usages.

[214] *See, e.g.*, Goode (1992), *supra* note 159; Farnsworth (1993), *supra* note 181; Schlechtriem (1997), *supra* note 151.

> "In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade."

The starting point of our analysis must be the textual acknowledgement that the reference to "good faith" in the interpretation provision of Article 7(1) CISG is limited to interpreting the Convention. In CISG there is no explicit general obligation – as there is in the Uniform Commercial Code[215] – imposed on the contracting parties to act in good faith when performing or enforcing contractual or statutory duties.

This limited reading of the role of "good faith" in CISG is clearly the one supported by the legislative history of the Convention.[216] It is worth noting that the 1964 Hague Uniform Laws do not refer explicitly to good faith and that in CISG the reference to good faith is deliberately limited to questions of interpretation in Article 7(1) CISG. Despite what can be seen as an explicit rejection of a direct good faith obligation placed generally upon the contracting parties, a consequential narrow reading of Article 7(1) CISG has not attracted total acceptance and has not remained unchallenged. Some scholars have suggested that, in fact, Article 7(1) CISG does impose a general obligation upon the contracting parties to act in good faith,[217] notwithstanding the language of the article and the legislative history of the Convention.

According to the present writer, perhaps the highest degree of confusion is generated by the completely legitimate recognition of good faith as a "general principle" of the CISG[218] for gap-filling purposes.[219] What is less, if at all, legitimate is the subsequent catapulting of the concept of good faith, in the form and with the content attributed to it as a "general principle" of CISG under Article 7(2), into the interpretative mechanism of CISG under Article 7(1), through the reference to "good faith in international trade". The interpretative scope and function of the reference in Article 7(1) are altered by such a definitional distortion – an illegitimate expansion of the concept in Art. 7(1), according to the legislative history of CISG – which, if accepted, would entail a direct and positive duty of good faith upon the contracting

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[215] *See* U.C.C. § 1-203.
[216] *See* P.Winship, "International Sales Contracts Under the 1980 Vienna Convention", 17 *UCC L.J.* (1984) 55, at 67, fn.40.
[217] *See, e.g.*, Rosett (1984), *supra* note 117, at 289-90.
[218] For a discussion of good faith as a general principle of CISG, *see* Chapter 4, *infra*.
[219] As *per* Article 7(2) CISG.

parties. This interchangeable, or rather indiscriminate, use of the concept of good faith between the two distinct, albeit related, provisions of CISG is responsible for much of the confusion surrounding the exact nature of the concept – a fact evidenced by the divergence of academic opinion. This divergence of opinion is important since the answer to the question posed – whether the reference to "good faith" in Article 7(1) CISG is to be read narrowly or not – carries many implicit complexities, which make the question of how "good faith" relates to the Convention more intricate. The resultant intricacies are evidenced by the following treatment of at least three different classes of cases[220] that a user of CISG is faced with.

(i) ***Cases that involve interpretation of CISG (i.e., other CISG provisions) to promote good faith in international trade.***

There is no opposing academic view to the application of the concept of good faith, as this is expressed in Article 7(1), in instances where such application would facilitate the reasonable interpretation of another CISG provision. This point is illustrated by the following example of a case to which Article 7(1) would apply. According to Article 24 CISG, a declaration of acceptance "reaches" the addressee when "it is ... delivered ... to his place of business or mailing address." If a party knows that the other party, who has a place of business, is away from his home for a considerable period of time, and he nevertheless sends the declaration to the mailing address, he may violate the requirement of good faith.[221] So, the concept of good faith is used to act as a limitation on the literal meaning of the requirement that a declaration "reaches the addressee"; it acts as an implied proviso.

(ii) ***Cases where neither CISG nor the contract provide an answer (i.e., where there is a gap in CISG).***

In this class of cases the concept of "good faith" can acquire a role different and more expanded to the one in the preceding class. There is academic opinion in support of such a development. For instance, Professor Kastely makes a persuasive case that implicit in many of the Convention's provisions is an obligation to act in good faith.[222] From these provisions can be distilled a general principle of good faith performance, which under Article 7(2) – added at the 1980 Convention, although

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[220] For a similar classification, *see* Winship (1988), *supra* note 131, at 633-4.

[221] This example is borrowed from G.Eorsi, "General Provisions", in *International Sales: The United Nations Convention on Contracts for the International Sale of Goods*, (N.Galston & H.Smit eds., 1984), Chapter 2, at § 2.03.

[222] *See* Kastely, *supra* note 118, at 597-600.

much debated before then – should be used to fill gaps in CISG.[223] As a logical consequence of this argument, the concept of good faith should not only be considered when interpreting the Convention text (*i.e.*, in the class of cases considered above in **(i)**), but also when filling gaps in CISG.[224] The following is an example of how this view on the expanded good faith concept might operate in filling a gap in CISG's provisions.[225]

In a hypothetical contract for the sale of goods governed by CISG, the seller's contractual obligations require that the seller performs by handing over to the buyer documents relating to the goods for sale, without, however, specifying the place where the delivery of the documents can take place. Turning to CISG, we note that Article 34 CISG states:

> "[i]f the seller is bound to hand over documents ... he must hand them over at the time and place and in the form required by the contract."

In this instance, both the contract and CISG are silent on the place of delivery. A general obligation to act in good faith would require the seller to deliver the documents at a place that is convenient to the buyer, and the buyer not to arbitrarily refuse delivery of the documents.

(iii) ***Cases where the contracting parties have agreed on a contract term, whether or not there is a relevant CISG provision.***

The agreement of a contractual term between the parties, in a contract governed by CISG, will derogate from any relevant provision of CISG. There is no opposing view to this, as Article 6 CISG clearly states so.[226] In such a case, can it be said that there is an obligation to act in good faith when interpreting the rights and obligations that arise from the specific contractual term?

A narrow reading of Article 7 CISG would suggest that these cases would not be covered by an obligation of good faith. An example of this can be the hypothetical case of a declaration of acceptance to an offer. In a sales contract stating that notices are to be mailed to a specified address, is the requirement of good faith violated by a

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[223] *Ibid.*, at 603-7.

[224] *See also*, P.Schlechtriem, *Uniform Sales Law: The UN-Convention on Contracts for the International Sale of Goods* (Vienna: Manzsche Verlags und Universitatsbuchhandlung, 1986), at 39: "the function of such a general [good faith] clause can probably be fulfilled by the rule that the parties must conduct themselves according to the standard of the 'reasonable person', which is expressly described in a number of provisions and, therefore, according to Article 7(2), must be regarded as a general principle of the Convention"; Bonell, *supra* note 113, at 85, § 2.4.1.

[225] The hypothetical example is borrowed from Winship (1988), *supra* note 131, at 634.

[226] Subject to Article 12 CISG.

party which, while it knows of the absence of the other party from the mailing address agreed upon, nevertheless sends a notice to that address?

At least one author has suggested that there is an obligation of good faith in such a case because he sees no distinction between interpreting CISG and interpreting the contract. In that author's opinion,

> "interpretation of the two can not be separated since the Convention is necessarily interpreted by the parties also; after all, the Convention constitutes the law of the parties insofar as they do not make use of Article 6 on freedom of contract."[227]

The present writer's concern regarding such an expanded use of the concept of good faith to contract terms, which derogate from CISG but are agreed by the parties, is founded on the ground that, if such use of the good faith concept were correct, it could extend this expanded obligation to all possible cases – a result expressly disapproved by UNCITRAL and the Vienna Conference.[228]

Since the fate of most theoretical subtleties is sealed in the arena of practice, the application of the good faith concept in CISG will take some time to crystalise. Professor Winship is of the opinion that whether or not the logic of the above view – *i.e.*, the expanded operation of the concept of good faith – wins the current academic debate, eventually a general obligation on contracting parties to act in good faith is more likely to be accepted.[229] The relationship between CISG and the UNIDROIT Principles[230] might provide some theoretical support to such a development. This relationship and the respective role of "good faith" in both instruments are examined in the following section of this chapter.

6. UNIDROIT PRINCIPLES, GOOD FAITH AND CISG

The UNIDROIT Principles can help to clarify the actual object of the good faith principle contained in CISG. As it was mentioned earlier in this chapter, CISG includes the good faith principle in Article 7(1), which provides the rules on the

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[227] Eorsi, *supra* note 221, at § 2.0.3. This analysis is cited with apparent approval by Professor Schlechtriem: *see* Schlechtriem (1986), *supra* note 224, at 40, fn. 115a.

[228] For a similar view, *see* Winship (1988), *supra* note 131, at 635.

[229] *Ibid.*

[230] A stated purpose of the UNIDROIT Principles of International Commercial Contracts is: "They may be used to interpret or supplement international uniform law instruments" (Preamble to the Principles); *see* UNIDROIT (ed.), *Principles of International Commercial Contracts* (1994) 15. The

interpretation of the Convention as a uniform international law text. According to that provision, CISG is to be interpreted and applied in a way that "the observance of good faith in international trade" is promoted. The CISG, however, does not contain an express provision that the individual contract has to obey the maxim of good faith as well. Just the opposite, the UNIDROIT Principles address good faith as a principle directed to the parties of international contracts, in Art. 1.7(1):

> "Each party must act in accordance with good faith and fair dealing in international trade".

Even more specifically, Art. 4.8(2)(c) of the Principles refers to good faith and fair dealing as a determining element of judging which contract term has to be implied in a contract. The UNIDROIT Commentary to the Principles also acknowledges that the good faith principle "may also be seen as an expression of the underlying purpose of the Principles" and may be used in interpreting the Principles.[231] On the other hand, the provision on the interpretation of the Principles (Art. 1.6) does not mention the maxim of good faith.

Despite these obvious differences in their wording, the supporters of the view that the good faith principle in CISG also applies to the interpretation of the individual contract and to the parties' contractual relationship as such, argue that both CISG and the UNIDROIT Principles agree, in essence, on the issue of "good faith".[232]

It must be noted that the good faith concept under examination has a unique feature; it is international in character. Under the CISG – and also under the Principles – it is clear that no specific national good faith concept can be applied, but only one that befits international trade relations. Both texts expressly stress this idea.[233]

Under the UNIDROIT Principles, the object of the good faith and fair dealing maxim is the behaviour of the contract parties. The parties shall act in accordance with the maxim; their conduct is regulated. Although the object of the principle in CISG is less clear, arguments have been advanced that the CISG also intends to ensure that

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role of the UNIDROIT Principles in interpreting or supplementing CISG will be discussed in more detail in later chapters.

[231] UNIDROIT (ed.), *Principles of International Commercial Contracts* (1994) 15.

[232] *See* Bonell (1987), *supra* note 113, at 2.4.1, pp. 84-5; R.Herber, "Article 7 CISG", in von Caemmerer/ Schlechtriem eds., *Kommentar zum Einheitlichen UN-Kaufrecht* (2nd ed., 1995), 35-100, at § 7; U.Magnus, "Art. 7", in Staudinger ed., *Kommentar zum Bürgerlichen Gesetzbuch (CISG)* (13th ed. 1994), at § 10.

[233] *See also* UNIDROIT, *supra* note 230, at 18; M.J.Bonell, *An International Restatement of Contract Law* (1994) 81.

contracts between parties from different countries are governed by the good faith principle.[234]

Both the CISG and the Principles provide a number of rules specifying what good faith is designated to mean in certain situations. And although CISG constitutes the more specific regulation, concentrating on a single type of contract only, it is the Principles that – despite, or because of, their general character – contain more provisions – and more detailed ones than CISG's – on good and bad faith.

(a) Precontractual obligations in the negotiation process

The CISG addresses the precontractual phase only indirectly by Art. 16(2)(b). The provision makes an offer irrevocable once the offeror has created a situation in which the offeree reasonably relied on the offer as irrevocable and acted in reliance on the offer. The same rule in identical wording is also adopted by the Principles (Art. 2.4 (2)(b) Principles).

The binding effect of some particular conduct and reliance on it emanates from the good faith principle that no one should take advantage of acts or situations that are irreconcilable with his prior conduct (prohibition of *venire contra factum proprium*). But in contrast to the CISG, the Principles establish a further duty not to continue or break off precontractual negotiations in bad faith (Art. 2.15 (2) Principles). Moreover, according to Art. 2.5 (3) Principles, it is bad faith when a party starts or continues negotiations while "intending not to reach an agreement with the other party". Thus, the good faith principle in the UNIDROIT Principles demands fair negotiations with a clear view to reach agreement. Misuse of the negotiation process to the detriment of the other party offends the standard of good faith recited in the Principles.[235]

(b) Formation and modification of contract

Although the CISG does not govern the precontractual phase, the regulation in the Principles will be helpful for cases where the parties negotiate on a modification or termination of an existing CISG contract.

Under both the CISG and the Principles, a contract and its alteration need no form in order to be valid.[236] Only if a written contract contains an oral modification clause

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[234] *See* Bonell (1987), *supra* note 113, at § 2.4.2; Herber (1995), *supra* note 231, at § 15.
[235] For further examples of bad faith *see* UNIDROIT (ed.), *supra* note 230, at 51 *et seq*.
[236] Art. 11 CISG; Art. 1.9 (1) UNIDROIT Principles.

must any modification also be in writing or in the form the parties agreed upon.[237] But to this exception, both the CISG and the Principles allow an identical sub-exception grounded on the good faith principle:

> " ...a party may be precluded by its conduct from asserting such a clause to the extent that the other party has acted in reliance on that conduct."[238]

This provision is another example where conduct which creates a situation of reliance and acting on it overrides rules of strict formality.

Material Validity

However, there is no room for comparative analysis between CISG and the UNIDROIT Principles on issues of material validity of contracts. The Principles contain provisions that deal with questions of material validity of contracts (Art. 3.1 - 3.20 Principles), while CISG does not deal with such issues (Art. 4(a) CISG). The Principles apply the good faith principle here, too.[239]

It can be deduced from the above that only the UNIDROIT Principles provide, more or less clearly, that also contract interpretation must be guided by good faith and fair dealing (Art. 1.7 and 4.8 Principles).

(c) Express contractual obligations

On the other hand, under the CISG a few specific provisions on the parties' statutory obligations contain good faith elements and notions, such as reasonableness. Thus, for instance, Article 35(2)(b) CISG obliges the seller to supply goods that are fit for a particular purpose indicated by the contract except where the buyer could not reasonably rely on the seller's skill or judgement. Another example is Article 42(2)(b) CISG, which states that a seller is not in breach of his obligations if he delivers goods not free from third-party rights when these rights resulted from the seller's compliance with buyer's particular wishes as to the manufacture, design, *etc.*, of the goods. The UNIDROIT Principles contain no comparable specific obligations to form a general regulation for all kinds of contracts.

(d) Implied obligations

The UNIDROIT Principles expressly state that contractual obligations may be implied under the maxim of good faith.[240] The CISG does not contain a comparable

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[237] Art. 29 (2) (first part) CISG; Art. 2.18 (1) Principles.
[238] Art. 29 (2) (second part) CISG and – in identical terms – Art. 2.18 (2) Principles.
[239] *See* Art. 3.5 (1) (a): if "it was contrary to reasonable commercial standards of fair dealing to leave the mistaken party in error"; similarly *see* Arts. 3.8, 3.10 (2).
[240] Art. 5.2 Principles. For examples of implied duties, *see* UNIDROIT (ed.), *supra* note 230, at 102.

rule. Nevertheless, it is widely accepted that also under the CISG additional obligations can be implied; in particular, a general duty to co-operate.[241] Just that same rule is now expressly provided for by Article 5.3 Principles:

> "Each party shall cooperate with the other party when such co-operation may reasonably be expected for the performance of that party's obligations."

This rule can be understood as expression of the general principle – based on good faith – that neither party must hinder performance through the other nor otherwise militate against the contractual purpose.[242]

(e) Non-performance caused by creditor

Both the CISG and the Principles state that

> " a party may not rely on the non-performance of the other party to the extent that such non-performance was caused by the first party's act or omission"

or – as only the Principles add –

> "by another event as to which the first party bears the risk."[243]

This provision again can be traced back to the sub-principle of good faith that no one should profit from his or her own unlawful or otherwise forbidden acts. The addition in the Principles seems to be a helpful rule for a situation not explicitly regulated by the CISG.

(f) Mitigation of damage

A principle of good faith seems to be able to explain the well-known mitigation rule. An aggrieved party cannot claim damages for losses that she herself could have avoided. The aggrieved party should not profit from his or her own omissions. Both the CISG and the Principles contain mitigation rules although they are differently worded. The Principles' mitigation rule seems to reduce the aggrieved party's claim when that party's failure to mitigate was causally connected with the loss. The CISG provision, in Art. 77, gives some discretion in that respect:[244]

> "... the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated".

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[241] *See* Bonell (1987), *supra* note 113, at § 2.3.2.2.
[242] U.Magnus, "Die allegemeinen Grundsatze im UN-Kaufrecht" [General principles under the UN Sales Convention][English translation], 3 *International Trade and Business Law Annual* III (Australia, 1997) 33-56, at 46.
[243] Art. 80 CISG; Art. 7.1.2 Principles.
[244] Art. 77 CISG; Art. 7.4.8. Principles.

(g) Conclusions

Despite some textual and other minor differences, is it plausible to argue that the CISG and the UNIDROIT Principles treat the general concept of good faith in international contracts in similar fashion, and with similar attitude? The answer is not simple, but it is very important since it could entail significant ramifications for the interpretative nature of Article 7 CISG.

Both the CISG and the Principles acknowledge that good faith plays an important role for international contracts. Furthermore, both texts do not exclusively rely on one abstract and general rule of good faith but try to specify the concept by more specific rules that elaborate on the principle in some detail. In a number of situations the Principles prove to be of helpful assistance for the good faith interpretation in the CISG.

However, unlike the Principles, CISG contains neither an express provision about good faith in individual contracts, nor one governing the precontractual phase. The legislative history of CISG should also not be overlooked, especially when it concerns complex concepts laden with socio-legal and political significance like good faith. The maxim of good faith is called upon by CISG to guide the interpretation of the unified law text itself, and by the Principles in order to prescribe the behaviour of the parties in every specific contract. According to the present writer, the expansive view supported by scholars, who attribute a double-role to good faith in CISG, can not be sufficiently supported.

It is the opinion of the present writer that, although it will be argued in this thesis that the UNIDROIT Principles have an important role in the uniform interpretation of CISG, the solution to the definitional and functional parameters of the concept of good faith in CISG can not be provided by a simple combination of the relevant provisions in these two instruments.

The alternative view, that under both instruments the maxim could fulfill a twofold function – *i.e.*, that it could govern, with other decisive factors, the meaning of the abstract law rules, as well as the individual contract – carries a lot of appeal, since it could solve many of the present interpretative difficulties in CISG, and some merit, due to the affinity between CISG and the UNIDROIT Principles. But, on the existing evidence, such view is not entirely convincing. The future direction of CISG and its interpretation will become clearer with the further development of relevant case law.

An international standard of good faith may already exist and may clearly be revealed and defined (*e.g.*, in business branches with a long-standing tradition, or as part of the old *lex mercatoria*). Also, there is plenty of potential for a modern standard of the principle of good faith that may not exist yet as a fully-fledged principle of the modern and (potentially) unified law of international sales. But it remains to be developed by business circles, arbitrators and courts, while interpreting CISG. Good faith in CISG, as it stands presently, is circumscribed to the interpretation of the law – including the filling of any gaps in it – and should not be allowed to impose additional duties of a positive nature to the parties.

7. ULIS PRINCIPLES AND CISG

The articles in ULIS dealing with the principles for the application of that Convention – Article 2 (no application of private international law) and Article 17 (gap-filling by applying general principles of the Convention) – were not adopted in the same form in the CISG.[245] Even so, Herber advises that

> "the principles to be applied in order to fill gaps do not materially differ from those in ULIS. Reference may therefore by made to the case law and literature on Art. 17 ULIS."[246]

Thus, illustrative ULIS case precedents can aid in the interpretation of Article 7 CISG. Herber, commenting on a German court decision, highlights that there is even a ULIS precedent for having the Convention itself accomplish that which is customarily accomplished by domestic unconscionability statutes; an issue that seems to involve a notion of good faith:

> "The Court of Appeal . . . had to decide the following case: An Italian seller had sold textiles for the manufacture of trousers to a German buyer. The seller's Conditions of Sale stated that all remedies were excluded after processing of the delivered goods. After delivery, the buyer examined the goods without discovering any defects, but when the finished trousers were ironed it turned out that the material was unfit. As a bar to the buyer's damage claim, the seller asserted his exemption clause. The Court rejected this defence, referring to Articles 79 and 80 ULIS (which basically correspond to

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[245] For a detailed account of the legislative history of Article 7 CISG and its relation to its predecessor in ULIS, *see* Chapters 3 and 4 in this work, *infra*. *See also*, R.Herber, "Article 7 CISG", in P.Schlechtriem ed., *Commentary on the UN Convention on the International Sale of Goods*, (Oxford: Clarendon Press, 1998) 9-68, at 60-61.

[246] Herber (1998), *supra* note 245, at 66.

> Articles 82 and 83 of CISG) and ruled that the clause violated basic principles of ULIS and was therefore ineffective."[247]

Commenting on the decision, Schlechtriem states:

> "Thus the [Vienna] Convention is not just a gap-filler. It may under certain circumstances also be a yardstick for the validity of clauses that the parties have not really agreed upon but that one has imposed upon the other through the use of standard terms or other means."[248]

The present writer is of the opinion that while the above ULIS case was decided correctly and can provide a helpful precedent, Professor Schlechtriem has, with respect, stretched its importance beyond its legitimate reach. It is made expressly clear in Article 4(a) CISG, that CISG is not concerned with the validity of the contract or of any its provisions.

There is also a ULIS precedent for reasonableness as a general principle of the Convention. In the Netherlands case of Tesa v. Amram (Amsterdam Court of Appeals, 5 January 1976, S&S 1978,79), the issue before the court was the reasonableness of the length of the period of time set for payment according to Article 62(2) ULIS. The court stated:

> "The Uniform Law on International Sales . . . uses in its Articles 10, 11, 18, 22, 26(1), 26(4), 37, 42(2), 61(2), 66(2), 74, 88 and 91 the words 'reasonable', 'unreasonable' and 'reasonably'; 'reasonableness' is therefore one of the general principles by which, in accordance with Article 17 ULIS, questions not expressly settled in the uniform sales law shall be answered."[249]

There are further illustrative interpretations and ULIS case support[250] noting that Article 7(1) CISG confirms that principles may be based on the notion of good faith. Its applicability in uniform law was assumed under ULIS.[251] Other principles can be

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[247] Judgement of a German court, 29 April 1982, Praxis des Internationalen Privat - und Verfahrensrechts (Germany) 1983, 232 *et seq*; *see* P.Schlechtriem, "The Seller's Obligations under the United Nations Convention on Contracts for the International Sale of Goods", in *International Sales*, Galston/Smit eds. (Matthew Bender: New York, 1984) ch. 6, at 6.

[248] Schlechtriem (1984), *supra* note 247, at 6.

[249] The source of this translation is F.J.A. van der Velden, "Indications of the Interpretation by Dutch Courts of the United Nations Convention on Contracts for the International Sale of Goods 1980", in P.Gerver, E.Hondius & G.Steenhoff eds., *Netherlands Reports to the Twelfth International Congress of Comparative Law - Sydney/Melbourne 1986*, (Asser Insituut/Martinus Nijhoff: The Hague, 1987) 21-45, at 44, fn.42.

[250] The ULIS case law referred to below comes from the chapter on Article 7 CISG by Herber (1998), *supra* note 245.

[251] *OLG Düsseldorf*, 20 January 1983, in P.Schlechtriem & U.Magnus, "Art. 17 [ULIS]", in *International Rechtsprechung zu EKG und EAG* [International case law on ULIS and ULF], (Nomos, Baden-Baden, 1987), at no. 7. *See* Herber (1998), *supra* note 245, at 66, fn.54.

derived from the need for the observance of good faith. They include, in particular, the prohibition of the misuse of rights.[252]

Case law on ULIS has also established the following principles: the place of performance for repayment of the purchase price following a declaration of avoidance is the seller's place of business;[253] compensation is to be made at the place where the party liable should have performed the obligation in respect of which compensation is claimed.[254] However, if the provision for recourse to domestic law (under Art. 7(2) CISG) is activated, these principles would only be used to a limited extent.

8. GAPS IN THE LAW: ISSUES OF VALIDITY

Commentators have expressed concern that common law judges are less familiar than their civil law counterparts with the process of drawing out general principles from particular statutory rules.[255] It is hoped that judges hailing from the common law jurisprudential tradition will make the effort to elaborate such general principles from the provisions of CISG. However, it is just as crucial for the longevity of CISG that judges – whatever legal tradition they represent – will refrain from unnecessarily finding gaps in CISG. Because of the broad language used in much of the text of CISG, a judge so inclined will not find it difficult to find gaps.

It has been correctly, as well as imaginatively, said that the issue of validity represents a "potential 'black hole' removing issues from the Convention's universe."[256] Due to this obviously serious threat to CISG's well-being, attention must be paid to it (as is the case with the latent problems in Article 7(2) CISG and the potential threat to CISG's uniformity posed by recourse to the rules of private international law).[257]

CISG deals with issues of validity in Article 4. This article states that

> "...except as otherwise expressly provided in this Convention, [CISG] is not concerned with:

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[252] *OLG Karlsruhe*, IPRax 1987, 237, 239. *See*, Herber (1998), *supra* note 245, at 67, fn.58.
[253] BGHZ 78, 257, 260. *See*, Herber (1998), *supra* note 245, at 67, fn.63.
[254] *OLG Köln*, RIW 1988, 555, 557; BGHZ 78, 257, 260. *See*, Herber (1998), *supra* note 245, at 67, fn. 64.
[255] *See* Winship (1988), *supra* note 131, at 635.
[256] This expression belongs to Professor Winship, *ibid.*, at 636.
[257] For a detailed analysis of Article 7(2) CISG and the dangers inherent in its structure, *see* Chapters 4 & 5 of this work, *infra*.

(a) the validity of the contract or of any of its provisions or of any usage;

(b) ..."

The real concern in the interpretation of CISG is that a judge so inclined may find issues of validity much more readily than anticipated by the drafters of CISG and thereby turn to national law solutions, side-stepping the application of CISG and thus rendering it virtually obsolete.

A brief look at the legislative history of Article 4(a) CISG, which reveals many differences from the quite elaborate drafting history of Article 7(1) CISG,[258] can be the starting point in the examination of the danger posed to CISG's interpretation by issues of validity in a contract.

A similar exclusion of issues of the validity of contracts in CISG, appears in the 1964 Conventions on uniform sales law. More specifically, Article 8 of the Uniform Law on the International Sale of Goods provided that

> "... the present law shall not, except as otherwise expressly provided therein, be concerned with ... the validity of the contract or of any of its provisions or of any usage."

Upon consultation of the unofficial commentary to the Uniform Law, prepared by Professor Tunc, we note the difficulty that the issues of validity presented in those efforts to produce ULIS.[259] Although the Bulgarian delegate suggested that the Uniform Law should include references to validity,[260] there was no protest to the exclusion of the issue of validity and virtually no discussion of the provision at the 1964 Hague conference.

As far as the meaning of "validity" is concerned, the records of the 1964 uniform laws provide little guidance. What we find is an inclusive definition of sorts, rather than one of clarity. It is suggested by Professor Tunc, in his commentary, that the issues of validity included questions of "the capacity of the parties or the exchange of their consents or in regard to vitiating factors", as well as "[municipal] regulations of a police character or for the protection of persons."[261] In addition, a French comment on a draft text gives the examples of rulemaking agreements unenforceable

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[258] The legislative history of Article 7(1) CISG is traced in Chapter 3 of this work, *infra*.

[259] *See* 1 Diplomatic Conference on the Unification of Law Governing the International Sale of Goods, in *U.N. Official Records* (1966) 363.

[260] *Ibid.*

[261] *Ibid.*

for lack of writing or for lack of a specified price.[262] This is all that can be found on point.

It can be deduced from the above observations that the topic of exclusion of issues of validity was not seen as controversial, or at least was not treated as such, during the UNCITRAL deliberations of the Uniform Sales Law (1964). In similar tone, in 1977, when the text was placed before the UNCITRAL session revising the uniform sales law, in preparation for the launching of CISG, it was suggested that the provision relating to issues of validity (Article 8 ULIS) be deleted because it was merely declaratory. The argument ultimately prevailed that such a provision was useful in preventing "overruling [of] domestic law on validity of contracts."[263]

Researching further the work of UNCITRAL's Working Group on International Sales on the inclusion or exclusion of validity issues in CISG, it is only noted that the topic was studied at the Working Groups at the eighth and ninth sessions, and it was ultimately concluded that there should not be any rules on validity.[264] The 1980 diplomatic conference in Vienna approved the final draft text of Article 4 with very little debate.[265]

There is academic support for the belief that despite this apparent lack of controversy surrounding it, Article 4(a) CISG has the "potential for mischief".[266] This concern stems from the realisation that the rationale for excluding issues of validity from the realm of CISG's concerns is linked to the differences in approach to the issue by the

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[262] *See* 2 Diplomatic Confererence on the Unification of Law Governing the International Sale of Goods, in *U.N. Official Records* (1966) 118. How the Sales Convention deals with purported contracts where the price is not specified continues to be problematic. *Compare* Article 14(1) CISG *with* Article 55 CISG (the latter text being the only place where the Convention explicitly refers to "validity" in the substantive provisions). For a discussion of this problem, *see* A.Farnsworth, "Formation of Contract", in N.Galston & H.Smit (eds.), *International Sales: The United Nations Convention on Contracts for the International Sale of Goods*, (Matthew Bender, NY, 1984), at § 3.04[1].

[263] *See* "Report of the United Nations Commission on International Trade Law on the Work of Its Tenth Session", Annex I, para. 75-77, U.N. Doc. A/32/17 (1977), *reprinted* in [1977] 8 *Y.B.U.N. Commentary on International Trade Law,* 11, 30 [U.N. Doc. A/CN.9/SER.A/1977].

[264] *See* "Report of the Working Group on the International Sale of Goods on the Work of Its Ninth Session", paras. 48-69, [U.N. Doc A/CN.9/142 (1977)], *reprinted in* [1978] *Y.B.U.N. Commentary on International Trade Law*, at 65-66, [U.N. Doc. A/CN.1/SER.A/1978]. *See also* "Report of the Secretary-General: Formation and Validity of Contracts for the International Sale of Goods", Annex II, paras. 18-27, [U.N. Doc. A/CN.9/128 (1977)], *reprinted in* [1977] *Y.B.U.N. Commentary on International Trade Law* 90, 92-93, [U.N. Doc. A/CN.9/SER.A/1977].

[265] *See* "Report of the First Committee", [U.N. Doc. A/CONF.97/11 (1980)], *reprinted* in United Nations Conference on Contracts for the International Sale of Goods, *Official Records* (1981) 85. The Summary Records of the Third Meeting of Committee I, report the debates on Article 4 CISG; see "Summary Records of Meetings of the First Committee, (3rd mtg.)", paras. 11-34 , [U.N. Doc. A/CONF.97/C.1/SR.3 (1980)], *reprinted* in United Nations Conference on Contracts for the International Sale of Goods, *U.N. Official Records* (1981), at 245-46.

[266] *See* Winship (1988), *supra* note 131, at 637.

divergent legal traditions. However, it is the same reason that could tempt the interpreters of CISG to enforce domestic rules on validity issues of contracts governed by CISG, either those of the forum or of the state whose laws would apply by reference to the rules of private international law. Such a development is to be avoided since it could prove a back-door introduction of divergent national laws and ethnocentric interpretations to CISG contracts. This would further attack the idea of international uniformity that CISG is trying to inspire. It has been suggested that some steps must be taken to guard against this danger.[267] The solution can come from within CISG and its in-built mechanism of interpretation and application: Article 7. It is expressly directed by Article 7(1) CISG that the text of the Convention is to be read in a manner that respects its international character and promotes its uniform application. Article 4(a) is part of the CISG text, so it must also be read according to these rules. Accordingly, interpretation of "validity" is not initially a question of domestic law. As Professor Honnold has written,

> "the substance rather than the label or characterisation of the competing rule of domestic law determines whether it is displaced by the Convention; the crucial question is whether the domestic rule is invoked by the same operative facts that invoke a rule of the Convention."[268]

If the same operative facts are involved, then CISG will provide the answer and there can be no exclusion of issues of validity in a sales contract. This will be the case, for example, with some aspects of the civilian concept of "error".[269]

It is possible that a common code of meaning could be given to "validity" as used in CISG. As Professor Winship notes, most countries will not enforce agreements on the grounds of illegality, capacity, fraud, mistake and duress.[270] However, less definite concepts, such as unconscionability, could provide instances for divergent interpretations. On this point, Professor Schlechtriem suggests that the contractual clause should be governed by CISG, rather than by domestic law. Professor Schlechtriem is of the opinion that a contract clause that limits recoverable damages for foreseeable losses should be valid because of the damage principles of CISG (as per Articles 74, 76 CISG) even if domestic law would declare such clauses

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[267] *Ibid.*
[268] *See* J.Honnold , *Uniform Law for International Sales* (1982) 97.
[269] *See* Heiz, "Validity of Contracts Under the United Nations Convention on Contracts for the International Sale of Goods, April 11, 1980, and Swiss Contract Law", 20 *Vand. J. Transnat'l L.* (1987) 639.
[270] *See* Winship (1988), *supra* note 131, at 638.

unconscionable.[271] However, the present writer is sceptical of such a use for Article 74 CISG, as it is arguable that while the said article provides for the general recovery of consequential damages, it says nothing about the surrender of this right.

Professor Winship has examined instances where CISG might not be able to overrule a domestic law on an issue of the validity of a contractual clause. Such a case arises with a contract clause that purports to liquidate damages, but which would be unenforceable in an Anglo-American jurisdiction as a penalty clause.[272] This issue is not addressed in CISG's current damage provisions, and while the contracting parties are free to exclude or derogate from CISG, under the expressly enunciated principle of freedom of contract (Article 6 CISG), that principle is subject to the express exclusion of validity issues.

In conclusion, we have a division of academic opinion on the dangers that issues of validity pose to the growth of CISG. While Professor Honnold is of the opinion that Article 4(a) CISG does not provide a large door for escape from the Convention,[273] Professor Winship is concerned that the Article 4(a) exclusion be interpreted narrowly since it can be a "potent force" undercutting the effort to unify – or at least, harmonise – uniform law.[274] What is common to both views – and is also shared by the present writer – is the desire that interpreters of CISG avoid strained ethnocentric interpretations of any of its provisions that could lead to its practical isolation from the world trade place where it deserves to be. Issues of validity will provide a big test of the strength of that same desire among other participants in the world trade.

9. A COMMON LANGUAGE

It has been noted earlier in this work that throughout the many years of efforts towards the unification of international trade law the participants engaged in an ongoing discussion of the goals and methods of the project.[275] A central theme in these unification efforts was the formation and facilitation of an international community, whose members can conceive relationships and resolve conflicts through the use of a new and common legal language.

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[271] *See* Schlechtriem (1986), *supra* note 224, at 33, fn. 83b.
[272] *See* Winship (1988), *supra* note 131, at 638.
[273] *See* Honnold (1982), *supra* note 268, at 98.
[274] *See* Winship (1988), *supra* note 131, at 638-9.
[275] *See* discussion of this point in Chapter 1 of this work, *supra*.

The artificial nature of such a new linguistic construct is prescribed by the intrinsic difficulties embedded at the core of the unification process itself. The parameters of the definition and composition of the international community created by CISG (as discussed in Chapter 1 of this work) also permeate the issue of a new *lingua franca*. As it was necessary for the drafters of CISG to articulate a set of issues or topics (and a set of terms in which to discuss these topics) when delineating its field of operation, it was also necessary that the language used to express these issues reflected the values that operate throughout CISG, so that the terms of CISG remain coherent and persuasive in the eyes of the members of that community. Only the process that gave CISG its communality could give CISG's language the requisite legitimacy for the present and the potential for growth in the future. And only the principles underlying the community of CISG could provide the basis for the new language found in CISG, because they suggest a common origin for both the substance and form of the CISG community.

Examining the formal structure of CISG we note that its drafters, by drawing upon a general conception of contractual relationships that is well recognised in many national legal systems, have organised the discussion of international sales relationships according to the three general topics of formation, obligations of the parties, and remedies for breach. The innovative part of the exercise is that, in discussing these general topics, CISG frequently uses words that refer to specific events that are typical of international transactions. The rules on risk of loss provide good examples of the use of event-oriented words. Article 67 CISG provides that:

> (1)...the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale. ...
>
> (2) Nevertheless, the risk does not pass to the buyer until the goods are clearly identified to the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise.

In similar tone, Article 69 CISG states that "...the risk passes to the buyer when he takes over the goods."

It becomes apparent that the drafters opted for the use of plain language, which refers to things and events for which there are words of common content in the various languages of the members that form the community created by CISG. The decision to draft rules based on overt commercial events is in line with the earlier analysis of

the need to rid the new language of words associated with specific domestic legal nuances.[276]

However, a remaining problem for CISG is the fact that there is no single international language. In the diplomatic conference that adopted CISG, the Convention was approved in six official languages: Arabic, Chinese, English, French, Russian and Spanish.[277] The preparation of the official versions was a co-ordinated effort of the United Nations language specialists, the UNCITRAL Working Groups, and the Drafting Committee of the 1980 Vienna Conference.[278]

The solution of approving multilingual versions of the uniform law text is not a panacea, since it does not solve certain practical problems. The first of such problems relates to the production of adequate translations without error. The difficulty of translation and reproduction of multilingual texts is illustrated by a typographical error in the Argentinean copy of CISG that resulted from the omission of a negative from the opening passage of Article 2.[279] This would have resulted in the inclusion of consumer sales and other transactions, which are explicitly excluded by the official versions of the Convention.

A second practical difficulty that arises under the regime of multilingual versions of CISG relates to the precision that each translation can achieve. It is impossible to expect each version of multilingual treaties to correspond to each other with exact precision. The potential danger is that the words used in one language will carry implications different from those in another.[280] This point is best illustrated when we consider the terms "offer" and "acceptance". These two words are well known legal terms of the common law jurisprudence and carry special weight of legal doctrine in that legal system. The same is true of their equivalents in the Western European languages.[281] However, when these words are translated in the other official versions, such as Chinese and Arabic, their translation only operates on the linguistic level and misses the doctrinal depth of their legal heritage.[282]

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[276] *See* generally, Honnold (1982), *supra* note 268, at 114.

[277] *See* Final Act of the United Nations Conference on Contracts for the International Sale of Goods, [U.N. Doc. A/CONF.97/18 (1980)], *reprinted* in United Nations Conference on Contracts for the International Sale of Goods, *U.N. Official Records* (1981), at 176.

[278] *See* Honnold, (1982), *supra* note 268, at 54-55.

[279] This mistake in the Argentinean copy of CISG is noted by Kastely, *supra* note 118, at 592, fn. 71.

[280] *See*, generally, H.Gutteridge, *Comparative Law* (2nd ed. 1949), at 1211-22 (discussing the difficulties with multi-lingual treaties).

[281] *See*, generally, R. Schlesinger, *et al.*, *Formation of Contract, A Study of the Common Core of Legal Systems* (Dobbs Ferry, Oceana, NY, 1968), 2 Vols.

[282] *See* Schlesinger (1968), *supra* note 281.

It has to be conceded that, despite the wide composition of the drafting team and the attention given to all official language versions of CISG, the drafting debate tended to focus on legal concepts drawn from either the civil law or common law traditions.[283] The problem facing the drafters was how to bring under-developed legal systems, which are sometimes bereft of specialist terms that have been developed in more developed systems, into an international community of trading. As a result, most of the words and concepts used in CISG are Anglo-American or Western European in origin. This solution was one of necessity and its ramifications must not be overestimated. It may be that certain words, albeit important ones, were taken straight out of developed legal systems, but they do not (and should not) bring with them to CISG the special depth of meaning that they have in their original context. Any interpretation of CISG's terms that relies on specific national connotations will be calamitous because what is wanted is an interpretation of CISG that is not only uniform, but truly international as well. Interpreters of the text must not violate the spirit of the law that is embodied in the Preamble and the interpretation provisions of the Convention. The meaning of the words imported from other legal systems must be circumscribed by their new context. Their importation into the text of CISG can only be seen as a means of assisting, rather than dominating, the discourse between members of the community.

An important decision that the drafters of CISG had to make regarding this issue was whether to include in CISG detailed definitions of significant terms.[284] The eventual choice was to include some definitions as needed within the text of particular provisions,[285] but not to have separate definitions of key terms as a separate part of the CISG.[286] This decision on drafting style is a further indication of the wishes of the drafters to produce a law that promotes international co-operation in its

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[283] *See* G. Eorsi, "Problems of Unifying the Law on Formation of Contracts for the International Sale of Goods", 27 *Am. J. Comp. L.* (1979) 311, at 315-23.

[284] *See* A.Farnsworth, "Problems of the Unification of Sales from the Standpoint of the Common Law Countries: Problems of Unification of International Sales Law", 7 *Digest of Commercial Laws of the World* ((Dobbs Ferry: New York, 1980) 3.

[285] *See* Article 14 CISG: "A proposal for concluding a contract addressed to one or more specific persons constitutes an offer..."; art. 18 CISG: "A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance."; Art. 25 CISG: "A breach of contract committed by one of the parties is fundamental ...".

[286] This style is more reflective of civil code drafting style than common law statutory practice. *See* Farnsworth (1980), *supra* note 284. This style contrasts with the detailed definitional system in the American Uniform Commercial Code.

application. Professor Kastely argues that this choice of drafting style has rhetorical significance, since detailed definitional sections

> "... encourage the reader to understand the words in a technical and limited way, and to perceive the text as self-contained. The reader is led to interpret such a text as limited to its specifically defined terms and to disregard its broader implications or implicit significance."[287]

On the other hand, Kastely notes that

> "informal, contextual definitions ... encourage a broad and conversational interpretation of the words of the text, leading to greater depth and complexity in the interpretation of individual provisions."[288]

The drafting style of CISG promotes discussion of the meaning of the language found in it. Its interpretation can not be given to users of CISG (*i.e.*, the international trading community) in advance and pre-determined; rather, it will be the result of deliberation, discourse and co-operation among the users.

To facilitate an intelligible interpretation of its text, the drafters of CISG incorporated in it a set of values that define the community formed by CISG and underpin the principles that this community is built upon. The most fundamental value in the conception of CISG is the diversity of its members and the respect and equality that they are to receive in that community. The Preamble is the first, but not the only, place where this value is expressed:

> "Considering that the development of *international trade on the basis of equality and mutual benefit* is an important element in promoting friendly relations among States,
>
> Being of the opinion that the adoption of uniform rules which govern contracts for the international sale of goods and *take into account the different social, economic and legal systems* would contribute to the removal of legal barriers in international trade and promote the development of international trade ...".

The remedial provisions of CISG are also structured to reflect the commitment to equality in its formal parallelism between buyer and seller. Professor Hellner has observed that

> "the symmetry in the rules on the remedies for the seller's and the buyer's breach of contract is probably prompted by a desire of being impartial to the seller's and the buyer's sides".[289]

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[287] Kastely, *supra* note 118, at 593.
[288] *Ibid.*, at 594.
[289] Hellner (1983), *supra* note 117, at 85.

The Convention expressly acknowledges the cultural, social and legal diversity that characterises its member states, and provides that these differences must be treated with sensitivity and sensibility. An example of this spirit is found in Article 8(2) CISG, which states that

> "... statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable *person of the same kind as the other party* would have had in the circumstances."[290]

During the negotiation of a contract, each party should attempt to learn the circumstances of the other. This will facilitate better understanding of the contract and decrease the possibility of a fall-out.

Similar language appears in Article 25 CISG, in the discussion of "fundamental breach":

> "A breach of contract committed by one of the parties is fundamental if it results in such a detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee *and a reasonable person of the same kind in the same circumstances* would not have foreseen such a result."[291]

Under this provision, the court or arbiter evaluating whether a breach is fundamental must consider the particular background and circumstances of the party in breach.

The commitment to equal treatment and respect for the different cultural, social, and legal backgrounds of its international members is consistent with other important values underlying CISG, such as commitment to keep the contract alive, forthright communication between parties, good faith, *etc.*[292] The interpretation of CISG must be guided by these enunciated principles.

10. DELIBERATION AND DECISION-MAKING IN CISG

Our analysis of the structural issues presented by the conception of CISG will now shift to the means that provide for future deliberation and decision-making within CISG's community.

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[290] Emphasis added by the present writer. This rule applies only if the party's subjective intention cannot be established. *See* Article 8(1) CISG: "For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was."

[291] Emphasis added. *See generally* Clausson, "Avoidance in Nonpayment Situation and Fundamental Breach Under the 1980 U.N. Convention on Contracts for the International Sale of Goods", 6 *N.Y.L. Sch. Int'l & Comp. L.* (1984), at 95-97 (discussing the definition of fundamental breach).

Some commentators had hoped for the establishment of an international court with jurisdiction over disputes arising under CISG. The main advantage of such a development would probably be the uniformity that a centralised judicial system can produce on disputes arising within its jurisdiction. Although the internal correlation of decisions handed down by a central judicial authority has superficial attraction, the idea has never been a realistic possibility for CISG.[293] The enormity of the financial task and the administrative structures necessary for the establishment of such a closed circuit system are prohibitive for the creation of a international commercial court. The long and laborious drafting history of CISG, coupled with the intrinsic diplomatic (*i.e.*, quintessentially political) nature of such a task, place any designs for the creation of a widely accepted international court almost into the realm of the untenable.

The risk that inconsistent interpretation could frustrate the goal of uniformity in the law was well understood by those working on CISG.[294] However, this problem is not exclusive to the present structures administering justice under CISG. All centralised judicial systems are also prone to this danger (although there is ultimately a final appellate level to provide redress). The nature of CISG's subject matter (*i.e.*, trade) is in itself unsuitable to the time consuming, delay laden mechanism of a single judicial authority. As such, the implicit assumption is that CISG will be applied by domestic courts and arbitral tribunals.[295]

The essence of the problem of CISG's divergent interpretation lies with the interpreters themselves; its nature is substantive and not structural. All the attention has been focused on the necessity, for the various courts and arbiters applying CISG, to understand and respect the commitment to uniformity and to interpret the text in

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[292] For a discussion of the general principles on which CISG is based upon, *see* Chapter 4 of this work, *supra*.

[293] *See* David (1971), *supra* note 41, at 4.

[294] *See* M.J.Bonell, "Some Critical Reflections on the New UNCITRAL Draft Convention on International Sales", 2 *Uniform Law Review* (1978) 2-12, at 5-9; Farnsworth (1980), *supra* note 284, at 9-10. The effort to ensure uniform interpretation of the Sales Convention and to inspire international discourse on issues raised by it is on going. *See, e.g.,* J.Honnold, "Methodology to Achieve Uniformity in Applying International Agreements, Examined in the Setting of the Uniform Law for International Sales Under the 1980 U.N. Convention" (1986), in *Report to the Twelfth Congress of the International Academy of Comparative Law, Sydney/Melbourne, Australia,* (August 1986).

[295] *See* "Progressive Development of the Law of International Trade: Report of the Secretary-General", 21 *U.N. GAOR* Annex 3 (Agenda Item 88), [U.N.Doc. A/6396], *reprinted* in 1 *Y.B.U.N. Comm'n on Int'l Trade L.*, at 39-40, [U.N.Doc. A/CN.9/SER.A/1970].

light of its international character.[296] The only feasible solution to the problems associated with decision-making under CISG is the development of a jurisprudence of international trade. Many commentators are of the opinion that the success of the Convention directly depends on the achievement of this goal.[297]

A useful common source of discussion is the Draft Commentary to the 1978 draft, prepared by the Secretariat, even though it was not officially adopted by the 1980 Vienna Convention.[298] The dynamic for developing a jurisprudence of international trade is established in Articles 7(1) and 7(2) CISG. These are arguably the most important articles in CISG, not only because their central location and stated purpose demand detailed treatment, but also because their success, or failure, will be determinative of CISG's eventual fate. The debate regarding the application of CISG generally, as well as in individual cases necessarily involves Article 7. Article 7(1) CISG directs tribunals to discuss and interpret the detailed provisions of the text with regard to its international character and the need for uniformity in its application.[299] Should interpreters of CISG pay heed to the drafters directions in Article 7 and the spirit of equality and loyalty with which CISG is imbued, Article 7 will have contributed to the coherence of the precariously fragile international community. Article 7(2) provides the important mechanism of filling any gaps in CISG and thus complements Article 7(1) by laying the course for the text's deliberation and future development. Thus CISG acquires the flexibility necessary to any instrument that attempts to deal with a subject matter as fluid and dynamic as international trade.

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[296] *See, e.g.*, "Working Group on International Sale of goods: Report of Work of Second Session", [U.N. Doc.A/CN.9/52 (1971)], *reprinted* in [1971] 2 *Y.B.U.N. Comm'n on Int'l Trade L.* 50, at 62, [U.N. Doc.A/CN.9/SER.A/1971]; "Summary Records of Meetings of First Committee, (5th mtg.)" [U.N. Doc.A/CONF.97/C.1/SR.5], *reprinted* in United Nations Conference on Contracts for the International Sale of Goods, *U.N. Official Records* (1981), at 254, 255. Other suggestions have been made for UNCITRAL to issue commentaries or advisory opinions interpreting the Sales Convention. *See* "Analysis of Comments and Proposals Relating to Articles 1-17 of the Uniform Law on the International Sale of Goods: Note by the Secretary-General",[U.N. Doc. A/CN.9/WG.2/WP.11], *reprinted* in [1972] 3 *Y.B.U.N. Comm'n on Int'l Trade L.* 69, at 77, [U.N. Doc. A/CN.9/SER.A/1970]; "Dissemination of Decisions Concerning UNCITRAL Legal Texts and Uniform Interpretation of Such Texts: Note by the Secretariat", at 4-7, [U.N. Doc. A/CN.9/267 (1985)]. Such materials would provide additional occasions for discussion and debate about CISG. What was not provided was some formal mechanism for amendment under the CISG. *See* Rosett (1984), *supra* note 117, at 294; Winship (1984), *supra* note 141, at 1.1, 1.49.

[297] *See, e.g.*, Kastely, *supra* note 118, at 601.

[298] *See* "Commentary on the Draft Convention on Contracts for the International Sale of Goods, Prepared by the Secretariat", [U.N. Doc. A/CONF.97/5], *reprinted* in United Nations Conference on Contracts for the International Sale of Goods, *U.N. Official Records* (1981), at 14. *See also,* P.Winship, "A Note on the Commentary of the 1980 Vienna Convention", 18 *Int'l. Law.* (1984) 37.

The spirit of international co-operation extends to the treatment that tribunals will afford to decisions of other national courts that are as significant as their own interpretation of the Convention.[300] Article 7(1), by directing an interpreter's attention to CISG's international character and stressing the goal of uniformity, emphasises the need for an international discussion among different national courts. Although CISG, once ratified, becomes part of the domestic law of each member State, it does not lose its international and independent character. The thoughts, decisions and reasoning of domestic courts are property of the international community that the Convention serves.

Of course, this international discussion and co-operation is not limited to the activity of courts and tribunals. It also extends to the deliberations of individual traders and their representatives. A study of the remedial provisions found in CISG reinforces this point. Forthright communication between the parties regarding their rights and obligations following a breach is not only expected but also required. Articles 46 and 62 CISG provide both the buyer and the seller with the right to performance.[301] The drafters thought that explicit recognition of such a right was important, even if it was not eventually enforced by injunctive order.[302] The existence of the right should be a factor in the negotiations between the contracting parties after a breach of contract has occurred. Although the foreseeability of a development (such as the one anticipated above – *i.e.*, that contracting parties will engage in discussion) is not always equivalent to planning for, or achieving, that development, the contracting parties are urged to notice and follow the suggested course of action. CISG makes this clear with its numerous references to this *modus operandi*. The seller's right to

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[299] *See* L.Reczei, "The Rules of the Convention Relating to its Field of Application and to its Interpretation, in Problems of Unification of International Sales Law", 7 *Digest of Commercial Laws of the World* (Dobbs Ferry: Oceana, March 1980) 53, at 91.

[300] *See* "Working Group on International Sale of Goods: Report of Work of Second Session", [U.N. Doc.A/CN.9/52 (1971)], *reprinted* in [1971] 2 *Y.B.U.N. Comm'n on Int'l Trade L.* 50, at 62, [U.N. Doc.A/CN.9/SER.A/1971]: "It was also suggested that the provision would contribute to uniformity by encouraging use of foreign materials, in the form of studies and court decisions, in construing the Law."

[301] Art. 46 CISG: "The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement."; Art. 62 CISG: "The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement."

[302] *See, e.g.*, "Report of the Working Group on the International Sales of Goods on Work of its Sixth Session", [U.N. Doc. A/CN.9/100], *reprinted* in [1975] 6 *Y.B.U.N. Comm'n on Int'l Trade L.* 49, at 56, [U.N. Doc. A/CN.9/SER.A/1975]; "Report of the Secretary-General Pending Questions with Respect to Revised Text of a Uniform Law on International Sale of Goods", Annex III, [U.N. Doc. A/CN.9/100], *reprinted* in [1975] 6 *Y.B.U.N. Comm'n on Int'l Trade L.* 88, at 101, [U.N. Doc A/CN.9/SER.A/ 1975].

cure (Article 37 CISG), the duty to mitigate loss (Article 77 CISG) and the obligation to preserve goods (Article 85 CISG), are clear indications of the need for discussion, negotiation and co-operation at all levels within CISG. CISG provides both the manner and the form in which such a development can occur. The manner is prescribed by the principles enunciated and accepted in the text and the form is provided by the new *lingua franca* used to express these principles.

All this activity is accommodated using the language of CISG and as sellers and buyers discuss and define their mutual rights and obligations, not only do they directly strive to make their specific contracts workable but they indirectly enrich the international language of CISG as well. Opportunities for deliberation and decision-making are required by, and provided for, in CISG in a way that can ensure not only CISG's coherence but its future development as well.

11. CONCLUSIONS

International trade has always been subject to numerous domestic legal systems, whether by the express choice of the contracting parties, or by virtue of the rules of private international law. The disputes arising out of international sales contract have been settled at times according to the *lex loci contractus*, or the *lex loci solutionis*, or the *lex fori*. This diversity of the various legal systems applied has hindered the evolution of a strong, distinct and uniform modern *lex mercatoria*. The jurisprudential heritage of the applicable law each time has represented the different political and cultural context responsible for that law and has created legal uncertainty and imposed additional transactional costs to the contracting parties. The burden has usually been carried by the weaker party, thus initially creating (and subsequently maintaining) an imbalance of power in favour of the party with the greater bargaining strength. The unification of law, in general, is desirable and is not based solely on material considerations. The unification of international commercial law is even more desirable since it can act as a total conflict avoidance device that, from a trader's point of view, is far better than conflict solution devices, such as choice of law clauses.[303]

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[303] *See* Chapter 1 of this work, *supra*.

Unification of the law inevitably entails changes in the legal outlook of courts, scholars, practitioners and traders throughout the world. In the place of national commercial laws, CISG represents the new way of addressing the complex relationships of international trade. In order to achieve such an ambitious goal, CISG has created and defined an international community of sellers and buyers. The input to the creation of the new unified legal construct has been wider than ever before, because it was crucial for the development of that community that its members consider themselves governed by this new common legal system that they themselves have helped create.

To facilitate the activities of that community, and to keep it united, CISG has attempted to introduce and establish a community where its members can communicate, deliberate and co-operate with each other using a new common language. What appears initially as a textual community (composed of CISG's authors and the States, courts, lawyers and others who make up its audience) can eventually evolve into a fully-fledged community of people engaged in deliberation and transactions beyond the text of CISG itself. This activity will improve CISG's established system of discourse and deliberation by enriching its language and strengthening the coherence and persuasive force of its underlying values. On the other hand, this textual community will remain lifeless without the activity of States ratifying CISG and people discussing it and using in their daily transactions.

However, our initial treatment of the nature of international sales law and the aspirations of CISG has revealed a number of further factors significant to its success and development. The wide participation in the drafting of CISG and its wide adoption rate are not sufficient elements for the achievement of uniformity in international sales. The decision of sellers and buyers to carry out their business under the provisions of CISG is necessary, but also not sufficient. It is equally important for the long-term success of CISG to achieve uniformity in the interpretation of its provisions by the national courts or tribunals applying them. Should domestic tribunals introduce divergent textual interpretations, this new unified law will be short-lived.

The success of CISG depends, in large part, on the coherence and the quality of the treatment it receives from courts, arbiters, lawyers, and scholars interpreting some individual provisions that lack clarity or contain ambiguous language. CISG is and must be seen as a text that contains a comprehensive set of significant topics and

terms and a set of values underpinning these terms. If domestic law is used to invade CISG's domain – whether in interpretation, or gap-filling – CISG's language will lose its integrity and the whole structure will collapse. Individual problematic provisions can and must be construed with regard to CISG's underlying values, if the overall structure is to be reinforced and enriched. This is the mandate expressed in Articles 7(1) and 7(2) CISG. The direction taken on this issue will determine whether the members of CISG's community form a true community of entities that abide to a uniform law, or simply a collective of independent entities who at times co-operate with each other *via* a harmonisation of sorts on specific topics.

During the formative stages of CISG itself, numerous difficulties arose and were resolved through debate and compromise among the diplomatic delegates to the Vienna Convention – itself a rhetorical process.[304] The adoption of CISG, being essentially a political act by the governments of member States, made it inevitable that the final version of CISG contain several textual compromises, which, in fact, are unresolved substantive difficulties. The most significant of these difficulties relate to CISG's gap-filling procedures and its use of Western legal concepts; they are issues that highlight the precariousness of the community contemplated by the Convention. These problems have already been introduced and underlined and will be discussed in more detail in the following chapters of this work.

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[304] Professor Honnold has stressed the importance of discussion to the work of UNCITRAL, leading to consensus without the need for formal votes; *see* Honnold (1979), *supra* note 88, at 210-11. For one participant's wry view of this process, *see* G.Eorsi, "Unifying the Law (A Play in One Act, With a Song)", 25 *Am. J. Comp. L.* (1977) 658.

CHAPTER 3

ARTICLE 7(1) OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

ARTICLE 7(1) OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

1. INTRODUCTION

Article 7 CISG

> (1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.
>
> (2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

From a systematic viewpoint, Article 7 CISG can be divided into three parts:[305]

(a) paragraph (1), first part, which declares that the "international character of the Convention" and the "need to promote uniformity in its application" are the basic criteria for the interpretation of the Convention,

(b) paragraph (1), second part, which establishes the relevance to be given to the "observance of good faith in international trade", and

(c) paragraph (2), which sets out the mechanism with which possible gaps in the Convention are to be filled.

This chapter will attempt to highlight, and then analyse, the main issues that arise in relation to Article 7(1) CISG, in order to help understand the structure, scope and function of the article. Article 7(2) CISG demands separate treatment and is analysed in the following chapter of this work, although certain unavoidable (and at times necessary) cross-references, or overlapping discussion, between the two paragraphs of the article are made in the current chapter.

The first part in the triadic classification of Article 7 CISG, above, is probably the most important one since it not only stresses the character of the Convention and its all-important goal of uniform application, but it also describes "the process by which those called upon to apply the Convention to a particular case ascertain the meaning and legal effect to be given to its individual articles".[306]

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[305] The present writer has adopted this structural classification, which appears in Professor Bonell's thorough treatment of Article 7 CISG; *see* Bonell (1987), *supra* note 113.

[306] Bonell, *ibid.*, at 72.

In effect, the first part of Article 7(1) is the tool that determines the precise scope of the other two parts of Article 7, too.[307]

It could be argued that the second part's concern for "good faith" might be used, in the facts of a particular case, to persuade a court to depart from a settled interpretation of the Convention and thus run contrary to uniformity, if only because its meaning and scope are so unclear.[308] If such an argument were successful, some discordance could be created between parts (a) and (b) of the above classification. However, it is the opinion of the present writer that the possibility for such discordance between parts (a) and (b) of the triadic classification is negligible because the concept of good faith does not stand alone in CISG; rather it carries the "international trade" qualification that circumscribes its scope in a manner consistent with part (a).

Article 7(1) CISG

Paragraph (1) of Article 7 CISG emphasises that in the interpretation of CISG one must pay close attention to three points:

(a) the "international character" of CISG,

(b) "the need to promote uniformity in its application", and

(c) "the observance of good faith in international trade".

It is the opinion of many scholars[309] not only that the first two of these points are not independent of each other, but also that, in fact, the second "is a logical consequence of the first." [310] The third point is of a rather special nature and its placement in the main interpretation provision of CISG has caused a lot of argument as to its precise meaning and scope.

In this chapter, following an examination of the legislative history of Article 7(1) CISG, a necessary preliminary step in the treatment of any product of an international unification process, the main issues that arise in relation to this Article will be highlighted and analysed in order to draw the proper meaning, scope and function of the article.

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[307] For instance, it may control the operation of Article 7(2) since the interpretation of a given provision is vital in determining whether that provision may be applied by analogy, or whether a true gap exists in CISG's provisions.

[308] *See* Chapter 2, *supra*.

[309] *E.g.*, *see* Honnold (1991), *supra* note 53, at 135; Bonell (1987), *supra* note 113, at 72.

[310] Bonell (1987), *supra* note 113, at 72.

2. LEGISLATIVE HISTORY OF ARTICLE 7(1) CISG

(a) The "international character" of the CISG

The text's direction to CISG's interpreters to have regard to the "international character" of the provisions of CISG requires, aside from the international experience that will be developed through jurisprudence and doctrine, that the Convention be placed in the proper international setting of its legislative history.[311] In drafting the Vienna Sales Convention, UNCITRAL built on the work that had produced the 1964 Hague Conventions (ULIS and ULF). It was mostly by revising the Hague Conventions that CISG was constructed, and it is by studying the deliberations that took place in UNCITRAL during this process that we can arrive at a better, more complete, understanding of the provisions of CISG. As the UNCITRAL Draft was being developed and refined, the documented proposals of the delegates to delete, or amend, the Convention's provisions, and the views that finally prevailed in those debates, form an important part of the finished product known as the United Nations Convention on Contracts for the International Sale of Goods, 1980. The material found in CISG's legislative history adds depth to the international understanding that underlies the Convention's text.

Commencing with an analysis of the treatment of the issues at hand in the 1964 Conventions, UNCITRAL, in some instances, retained the solutions found in the Hague Conventions.[312] The discussions of these analyses not only shed light on the common understanding of the particular Hague solutions and the reasons for their retention, but also provide a clear statement of the intended meaning of these solutions in the context of CISG. Similarly, in the instances where the Hague approach was modified or rejected, the reasons for the alterations shed light on the intended purpose of the new provisions inserted in CISG.

The documents that embody this legislative history are reproduced in Volumes I-X of the UNCITRAL Yearbooks and in the Official Records of the 1980 Diplomatic Conference. In such an extended legislative process, the articles-numbers of the drafts under discussion kept changing as provisions were added and deleted and as the draft's structure was reorganised. Professor Honnold prepared a Documentary History that reproduces the relevant documents and provides references to the

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311 *See* Honnold (1991), *supra* note 53, at 137.
312 *Ibid.*

repeated renumbering of the articles making it easier to trace the legislative history and development of CISG's provisions.[313]

(b) The "need to promote uniformity" in the Convention's application

The predecessor to CISG, ULIS, had addressed the problem of interpretation of the Convention in the following statement in Article 2 ULIS:

> "Rules of private international law shall be excluded for the purpose of the application of the present Law, subject to any provision to the contrary in the said Law."

When this provision is read together with Article 17 ULIS,[314] which deals with the issue of gap-filling by referring to the use of the Convention's "general principles", one recognises a strong indication that ULIS was "intended to constitute a self-contained law of sales, to be construed and applied autonomously, *i.e.*, without any reference to or interference from the different national laws."[315] This approach of independence and self-sufficiency strengthens the position of the uniform law as an international instrument that should be interpreted and applied in a uniform manner. However, it was strongly argued in UNCITRAL that the uniform law could not be considered as totally separated from the various national laws, and that it would be unrealistic and impractical to construe many undefined terms contained in the Convention without having recourse to national law.[316] At the first session of the Working Group in 1970 several proposals were submitted for the revision of Article 17 ULIS. One suggestion was to redraft the text as follows:

> "The present Law shall be interpreted and applied so as to further its underlying principles and purposes, including the promotion of uniformity in the law of international sales."

Another suggestion was to delete the provision in its entirety, or to modify it so that it states expressly that "private international law shall apply to questions governed but not settled by ULIS". Neither of these proposals was supported by a majority of the Working Group.[317] At the request of the Commission, which at its third session, in 1970, was equally unable to reach an agreement,[318] the Working Group discussed

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[313] *See* Honnold (1989), *supra* note 89.
[314] "Questions concerning matters governed by this law which are not expressly settled in it are to be settled in conformity with the general principles on which the present law is based" (Article 17 ULIS). For treatment of the gap-filling provision of the Article 7(2) CISG, *see* Chapter 4 of this work, *infra*.
[315] Bonell (1987), *supra* note 113, at 66. This approach adopted by UNCITRAL in ULIS, with respect to its interpretation, has been called "revolutionary": *see* David (1971), *supra* note 41, at 138.
[316] *See* Yearbook, I (1968-1970), 170; Yearbook, II (1971), 49.
[317] *See* Yearbook, I (1968-1970), 181-183.
[318] *See* Yearbook, I (1968-1970), 136.

the matter again at its second session, in 1971, and on that occasion decided to recommend the adoption of the following new version of Article 17:

> "In interpreting and applying the provisions of this Law, regard shall be had to its international character and to the need to promote uniformity in its interpretation and application."

The report of the Working Group stated that the proposed revision would clearly express two considerations not mentioned in the original Article 17: (i) the international character of the law, and (ii) the need for its uniform interpretation and application. It was added that the omission from the original text of the reference to "the general principles on which the present Law is based" was due to the fact that such a reference was considered to be too vague.[319] At its fourth session, in 1971, the Commission approved the new provision as proposed by the Working Group. At the same time it was suggested that the provision be supplemented by an additional paragraph dealing with gaps in the uniform law. Opinions were equally divided between those who insisted on a "general principles" solution, along the lines of Article 17 ULIS, and those who, on the contrary, favoured the approach according to which possible gaps in the uniform law should be filled in by the domestic law indicated by the rules of private international law. The Commission decided not to take any final decision on this matter and to refer it to the Working Group for its consideration at an appropriate time.[320] At subsequent sessions, devoted to the revision of ULIS, the Working Group did not discuss the matter further. The only change introduced to the original proposal was to delete the words "in its interpretation and application", since they were considered to be redundant. Consequently, when the Sales Draft was adopted by the Working Group at its seventh session, in 1976, it contained Article 13 which read as follows:

> "In the interpretation and application of the provisions of this Convention, regard is to be had to its international character and to the need to promote uniformity."[321]

(c) The "observance of good faith in international trade"

In the course of the revision of the Hague 1964 Conventions, the Working Group adopted at its ninth session, in 1978, a new provision (Article 5) not previously contained in ULF:

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[319] *See* Yearbook, II (1971), 62.
[320] *See* Yearbook, II (1971), 72.
[321] *See* Yearbook, VII (1976), 90.

> "In the course of the formation of the contract the parties must observe the principles of fair dealing and act in good faith."[322]

This article was the subject of a lengthy discussion at the eleventh session of the Commission, in 1978.[323] The debate related to the retention, or deletion, of this new provision. Those who favoured the deletion of the provision acknowledged that good faith and fair dealing are highly desirable principles in international commerce, but emphasised that the way in which these principles were formulated was too vague. They argued that national courts applying the provision of "fair dealing and good faith" would necessarily be influenced by their own legal and social traditions with the result that different interpretations would be given to the provision in different countries. It was also argued that the draft uniform law did not specify the consequences of failure to observe the principles which were made binding on the parties. This meant that the consequences of a violation of the principles of good faith and fair dealing would be left to national law, with the result that no uniformity of sanctions would be achieved either.

The arguments in support of the article's retention were equally forceful. Firstly, it was argued that because of the world-wide recognition of the principle of good faith there would be little harm in including it in the Convention. Countering the objection that the proposed provision did not set out the consequences of a violation of the principles of good faith and fair dealing, it was argued that sanctions should be determined by the courts in a flexible manner and according to the particular circumstances of each case. It was further added that, even without sanctions, the existence of the provision would be of benefit because it would draw the attention of the parties and the court to the fact that high standards of behaviour were expected in international trade transactions.

Some possible compromise solutions were suggested to resolve the difference of opinion on the inclusion of the good faith provision. One suggestion was to include the substance of the proposed Article 5 in a preamble to the Vienna Sales Convention. The supporters of the good faith principle objected that this would deprive it of any effect. Another compromise proposal was to incorporate the requirement of the observance of good faith into the rules for interpreting the statements and conduct of the parties. The argument against this suggestion was

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[322] *See* Yearbook, IX (1978), 67.
[323] *See* Yearbook, IX (1978), 35 and 132-133.

based on the point that the proposed Article 5 was not concerned with the intent of the parties, but sought to establish a standard of behaviour to which the parties were obliged to conform. A third suggestion was to incorporate the principle of observance of good faith into the article on the interpretation and application of the provisions of the Convention. The Commission eventually accepted this last suggestion as a realistic compromise solution.

Hence, Part II of the new consolidated text of the UNCITRAL Convention, as adopted by the Commission at the same session,[324] no longer contained a provision corresponding to Article 5 of the original Formation Draft. Instead, Article 6, which corresponded to Article 13 of the former Sales Draft, and now appears as Article 7 of CISG, was revised so as to read as follows:

> "In the interpretation and application of this Convention regard is to be had to its international character and to the need to promote uniformity and the observance of good faith in international trade."

Several amendments to Article 6 of the UNCITRAL Draft Convention were submitted at the Vienna Conference. Some of these amendments were merely of a drafting character and led to the small grammatical changes that now appear in the wording of Article 7(1) CISG. But there were also some amendments of substance submitted and they related to the addition of a new paragraph to the provision dealing with the problem of gaps in CISG.[325]

The appropriateness of referring to the principle of good faith in this article on the Convention's interpretation and application was questioned again at the Vienna Conference. Two amendments were submitted, both suggesting the deletion of the last part of Article 7, paragraph 1 (*i.e.*, "the observance of good faith in international trade") and to transfer it to another context. The first proposal was to add at the end of Article 7(3) of the UNCITRAL Draft Convention (now Article 8 CISG) the words "having regard to the need to ensure the observance of good faith in international trade".[326] The second proposed amendment suggested that a new article be included after Article 6 of the UNCITRAL Draft Convention (now Article 7 CISG) stating that:

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[324] *See* Yearbook, IX (1978), 114 *et seq.*

[325] For a discussion on Article 7(2) CISG, dealing with possible gaps in CISG, *see* Chapter 4 of this work, *infra*.

[326] *See* the amendment of Norway: [U.N. Doc. A/Conf.97/C.1/L.28].

> "In the formation, interpretation and performance of a contract of sale the parties shall observe the principles of good faith and international cooperation."[327]

Although the two proposals did receive some support, the prevailing view was against reopening discussion on an issue that had already been the subject of extensive debate within UNCITRAL leading to the present compromise solution. Thus, Article 7(1) CISG was adopted without further changes.

3. THE INTERNATIONAL CHARACTER OF THE CONVENTION

The creation of a uniform law is only the first step towards uniformity. It is the interpretation – and the uniform application – of the uniform law that will complete the process, and it is at these latter stages that the success, or failure, of the unifying effort can be judged.[328] Every legislative instrument raises issues of interpretation as to the precise meaning of its provisions, even within the confines of a national legal system. Such problems are more prevalent when the subject has been drafted at an international level. In the interpretation of domestic legislation reliance can be placed on methods of interpretation and established principles within a particular legal system – the legal culture, or infrastructure, upon which the particular legislation is seated. However, when dealing with a piece of legislation such as CISG, which has been prepared and agreed upon at international level and has been incorporated into many diverse national legal systems, interpretation becomes far more uncertain and problematic because there is no equivalent international legal infrastructure upon which this instrument will be seated. Does that mean that CISG is seated on a legal vacuum? The answer is yes and no. CISG was given an autonomous, free-standing nature by its drafters and it is true that there are no clearly defined international foundations (equivalent to those in a domestic legal setting) upon which CISG is placed. However, as will be argued throughout this work, there are general principles of international law (*e.g.*, the UNIDROIT Principles) that can

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[327] *See* the amendment of Italy: [U.N. Doc.A/Conf.97/C.1/L.59].

[328] *See* R.J.C.Munday, Comment, "The Uniform Interpretation of International Conventions", 27 *Int'l. & Comp. L. Q.* (1978) 450: "The principal objective of an international convention is to achieve uniformity of legal rules within the various States party to it. However, even when outward uniformity is achieved following the adoption of a single authoritative text, uniform application of the agreed rules is by no means guaranteed, as in practice different countries almost inevitably come to put different interpretations upon the same enacted words."

provide the platform and support that CISG, like any other piece of domestic or international piece of legislation, needs.

Accepting that interpretative problems naturally arise in relation to any international Convention, there is a further point that needs to be made; that these problems are accentuated when the international legislative instrument is in the field of commercial law, because of the proportional relationship that generally exists between the number of issues of interpretation of a Convention and the number of legal systems represented by the various Contracting States to that Convention.[329] Principles of interpretation could be borrowed from the law of the forum, or the law which according the rules of private international law would have been applicable in the absence of the uniform law. Either approach would result in a diverse construction and implementation of the same piece of legislation by different Contracting States. According to some commentators, the result would not only be a lack of uniformity, but also the promotion of forum shopping.[330] Such a result would undermine the purpose of the uniform legislation and defeat the reasons for its existence.

On the other hand, an autonomous and uniform interpretation, if this could be achieved in practice, would go a long way towards completing the process of unification and achieving the aims of the drafters of the uniform international instrument. Article 7(1) CISG declares that such an autonomous approach must be followed in interpretation, befitting the special character and purpose of the Convention. To have regard to the "international character" of the Convention must mean that its interpreter[331] must understand that, although CISG has been formally

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[329] *See* Ferrari (1994), *supra* note 39, at 198, with a reference to B.Audit, *La Vente Internationale de Marchandises: Convention des Nations Unies du 11Avril 1980* [The International Sales of Goods, UN Convention of 11 April 1980 - *in French*] Paris: *Librairie Générale de Droit et de Jurisprudence* (1990) 47.

[330] *See* Honnold (1991), *supra* note 53, at 142: "the settlement of disputes would be complicated and litigants would be encouraged to engage in forum shopping if the courts of different countries persist in divergent interpretations of the convention." *Contra,* F.Enderlein, "Uniform Law and its Application by Judges and Arbitrators", in *International Uniform Law in Practice: Acts and Proceedings of the 3rd Congress on Private Law* (UNIDROIT, Rome, 7-10 Sept. 1987) (Oceana, Dobbs Ferry: New York, 1988), at 340-341, who thinks that the lack of uniformity in the interpretation of uniform laws has no influence on the choice of forum, so the danger of forum shopping is not real in these circumstances.

[331] Enderlein and Maskow make the point that interpreters are not only the judges or arbitrators but the contracting parties as well; *see* F.Enderlein & D.Maskow, *International Sales Law* (Oceana, NY, 1992) 55. This point is controversial and there are practical and theoretical objections to it. If Enderlein's point, that Article 7 CISG is addressed to the parties, is correct, then that provision might in practice be excluded by them under Article 6 CISG. In practice, this would hinder uniformity in

incorporated into many different national legal systems, the special nature of CISG as a piece of legislation prepared and agreed upon at an international level helps it retain its independence from any domestic legal system. It is essential for the long-term success of CISG that the rules and techniques traditionally followed in interpreting ordinary domestic legislation are avoided. For instance, in most common law countries domestic legislative instruments are traditionally interpreted narrowly so as to limit their interference with the law developed by the courts.[332] However, the CISG is law intended to cover the field of international contracts of sale and, in doing so, to replace all national statutes and case law previously governing matters within that field. The autonomy of this international sales law depends not only on the drafting of the respective rules into a separate body of rules, but also on the emancipation of this body of rules from other branches of the law in the international and domestic legal systems.[333] Even though CISG is incorporated into municipal law, international sales law should not be regarded as a part of various national legal systems because this would inhibit its development as an autonomous branch of law and distort its interpretation and application. Instead, it is suggested that international sales law rules should be seen as part of international law in the broad sense and should be entitled to an international, rather than national, interpretation. The consequence of realising the essence of the Convention's international character and autonomy is that there should be no reason to adopt a narrow interpretation of CISG. Express support for this point is provided by Professor Bonell:

> "Instead of sticking to its literal and grammatical meaning, courts are expected to take a much more liberal and flexible attitude and to look, wherever appropriate, to the underlying purposes and policies of individual provisions as well as of the Convention as a whole."[334]

Such an attitude has been adopted in the United States for the interpretation of the Uniform Commercial Code.[335] Also, in a number of cases, American[336] and

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interpretation. The theoretical objection is that the statement seems to obliterate the distinction between interpretation by the court and performance of the contract by the parties.

[332] *See* Bonell (1987), *supra* note 113, at 72-73.

[333] *See* J.Jakubowski, "The Autonomy of International Trade Law and its Influence on the Interpretation and Application of its Rules", in *Law and International Trade, Recht und Internationaler Handel Festschrift fur Clive M. Schmitthoff*, (Frankfurt, Athenaum Verlag: 1973), 209.

[334] Bonell (1987), *supra* note 113, at 73.

[335] *See* Section 1-102 (3) of the United States Uniform Commercial Code.

[336] *See*, e.g., Lisi v.Alitalia S.p.a., 370 Federal Reporter, Second Series (U.S.) 508 (1966); Day v.Trans World Airlines Inc., 528 Federal Reporter, Second Series (U.S.) 31 (1975). Both cases dealt with the Warsaw Convention on International Carriage by Air (1929). *Also see*, Mitsui & Co. Ltd. et Ataka &

English[337] Courts have shown a willingness to take a similar liberal approach when called to deal with other international Conventions.

It is the view of the present writer that Article 7 represents an implied provision in CISG for the undertaking of such a liberal approach to the interpretation of the body of law in question. It must be acknowledged, however, that the danger with adopting a broad view of the CISG is that it might open the way to diverse national interpretations, if "broad" and "liberal" were equated with notions of theoretical diversity and practical relaxation of the rules of CISG's interpretation. This realisation reveals the possible existence of a paradox; that internationalism might be better served by a narrow interpretation. The present writer believes that this is merely an aberration, or rather an illusion, since the nature of CISG and the intentions of its drafters point unequivocally to its broad and liberal interpretation. If its interpreters realise the true spirit of CISG and enforce it in practice, then a liberal approach, far from diversifying the results, will achieve uniform results. This is so because the broad and liberal approach, in this case, does not mean the endorsement of many different national views, but the adoption of a single, uniform, a-national approach. Such an approach is broad and liberal by definition, since it operates outside and above the restrictions, limitations and narrowness of established national approaches to interpretation. The broad global scope of CISG requires that its interpretation be of a similar nature. For the "legal barriers in international trade"[338] to be successfully removed, a broad and liberal approach to the interpretation of CISG is required. Only such an approach can successfully "take into account the different social, economic and legal systems"[339] that CISG is aiming to unite, at least in the field of sale of goods. The proper interpretation of CISG must be broad and liberal, but not lax or abstract.

Co. Ltd. v. American Export Lines Inc., 628 Federal Reporter, Second Series, 802 (1981), dealing with the Brussels Convention on Bills of Lading (1924).

[337] "[T]he primary search must be for an objective and independent interpretation capable of accommodating the needs of a diversity of legal systems", *per* Lord Slynn, speaking of the Brussels Convention (1968), in Baltic Insurance Corpn v. Jordan Grand Prix Ltd (House of Lords, 16 December 1998, available on the internet web, under *House of Lords*). *See also*, Corocraft Ltd. v. Pan American World Airways Inc. [1969] 1 All ER, 82; Fothergill v. Monarch Airlines [1980] 2 All E.R., 696, both of which dealt with the Warsaw Convention on International Carriage by Air (1929); and The Hollandia [1928] 3 W.L.R. 1111, which dealt with the 1924 Brussels Convention on Bills of Lading. Other examples include the cases of Buchanan v. Babco Forwarding and Shipping [1977] 1 All ER 518, and Thermo Engineers Ltd. and Anhydro A/S v. Ferrymaster Ltd. [1981] 1 All ER 1142, dealing with the Geneva Convention on International Carriage by Road (1956).

[338] Preamble to the CISG.

[339] Preamble to the CISG.

Neutral language – a new *lingua franca*

The quality of the "international character" attributed to CISG has yet a further dimension. Such a characterisation denotes that the terms and concepts of CISG must be interpreted autonomously of meanings that might traditionally be attached to them within national legal systems. To have regard to CISG's international character must mean that the interpreter should not apply domestic law to solve the interpretative problems raised in CISG. The reading of CISG in the light of the concepts of the interpreter's domestic legal system would be a "violation" of the requirement that CISG be interpreted with regard to its "international character".[340] The terms of CISG must be interpreted "in the context of the Convention itself."[341] Such a conclusion becomes necessary when one looks at the genetic background of CISG. The form and content of CISG is the outcome of prolonged deliberations between lawyers representing a multitude of diverse legal and social systems and cultural backgrounds. The provisions of CISG had to be formulated in sufficiently neutral language in order to reach a consensus not vitiated by misunderstanding amongst its drafters. The choice of one word rather than another represents the process of a compromise, rather than the acceptance of a concept peculiar to a specific domestic legal system. It was attempted to avoid terms that have been endorsed and shaped by diverse historical, social, economic and cultural structures in the various legal systems. Any such terms would be abstract and disembodied in the context of CISG. A good example of this effort can be found in the wording of Chapter IV of CISG. Talking about the passing of the risk of loss to the buyer, Article 67(1) CISG states that in a contract of sale that involves carriage of the goods the risk passes to the buyer when the goods "are handed over" to the first carrier. In similar tone, Article 69(1) CISG states that in contracts that do not involve carriage the risk passes when the buyer "takes over" the goods. Words such as "delivery" and concepts such as "property" and "title", loaded with peculiar domestic importance, have been intentionally avoided. As it has been put by one of the drafting fathers of CISG:

> "The ideal is to use plain language that refers to things and events for which there are words of common content in the various languages."[342]

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[340] *See* Honnold (1991), *supra* note 53, at 136, where the author also states that: "To read the words of the Convention with regard to their 'international character' requires that they be projected against an international background."

[341] *See* Bonell (1987), *supra* note 113, at 74.

[342] Honnold (1991), *supra* note 53, at 136.

And in the instances where terms, or concepts, from a particular legal system were used, it was never intended to use these terms in their traditional meaning.[343] If concepts in CISG were taken from national law, there would be a danger of interpreting these concepts in accordance with the law of their origin instead of interpreting them autonomously. It is authors, as well as judges, that are susceptible to such a distorted interpretation of CISG's provisions. This alarming observation has been made by Sevon who notes:

> "Most authors (in the literature of the Vienna Sales Convention) seem to stress that the Convention closely resembles the national law of sales of the author's country. ... There is thus a considerable risk that concepts used in the Convention will be believed to correspond to identical or even to similar concepts in national law."[344]

The drafters of CISG employed neutral, "a-national" language to avoid such distortions. The neutrality of the words chosen for CISG promotes CISG's autonomy and advances UNCITRAL's objectives of internationality and uniformity of interpretation and application. Any perceived proximity of CISG to various national laws is not disturbing and should be seen as a mark of its success, since it illustrates the outcome of multiple participation in its drafting.

The fact that CISG has been published in the six official languages of the United Nations, with each version being equally authentic, enhances the notion of its internationality and strengthens the case for an autonomous interpretation of its provisions. It is arguable that, to a certain extent, the publishing of CISG in all six official languages of the United Nations makes interpretation easier because it is possible for a court to apply the method of comparative interpretation and find the exact meaning and content of a provision by comparison.[345] However, it must be noted that it would be unrealistic to expect every court to compare every language version.

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[343] *See* Bonell (1987), *supra* note 113, at 74. For a similar statement, *see also* Honnold (1991), *supra* note 53, at 136. This seems to be the best and most widely accepted view. However, for somewhat different conclusions, *see* F.J.A. van der Velden (1987), *supra* note 249, at 33-34, where the author states that where a source of uniform law is a specific provision of national law, recourse to its domestic interpretation is a logical aid to interpretation of the uniform law; F.A.Mann, "Uniform Statutes in English Law", 99 *Law Quarterly Review* (1983) 376, at 383, where the author states that if a Convention adopts a phrase which appears to have been taken from a legal system where it is used in a specific sense, the international legislators are likely to have had that sense in mind and to intend its introduction into the Convention.

[344] *See* L.Sevon, "Method of Unification of Law for the International Sale of Goods", *National Report of Finland Finland to the Twelfth International Congress of Comparative Law - Sydney* (August 1986), at 16.

[345] *See* Enderlein (1988), *supra* note 330, at 337.

Of course, these actions do not guarantee success, because the legal viewpoint of the users of CISG is usually shaped by their particular national, educational and vocational background. Most of the difficulties in the interpretation of international uniform law arise because there is no common heritage of judicial techniques and substantive law among the Contracting States. This lack of common ground inevitably creates difficulties which result into divergences in the outcome of the process of interpretation and impede uniformity. Domestic civil procedure, plus differences in the way that the division between law and fact is drawn in different legal systems, are major obstacles to uniformity. Universities have a role to play in overcoming some of these obstacles, by encouraging and developing programs of comparative law studies that can promote further substantive awareness of foreign law and procedure.[346]

4. UNIFORMITY OF APPLICATION

At this point, the inter-relation between the first two parts of Article 7(1) CISG becomes more apparent. The autonomous interpretation of CISG is not simply a consequence of the "international" characterisation of CISG, but also a necessity, if "the need to promote uniformity in its application" is to be taken seriously. In CISG, the elements of "internationality" and "uniformity" are not only inter-related – thematically and structurally, because of their position in the same Part and Article of the Convention, and functionally, because an autonomous approach to interpretation is necessary for the functioning of both – but inter-dependent as well. The existence of one is a necessary prerequisite for the existence of the other. The international, rather than national, interpretation is necessary in order for uniformity in the application of CISG to be achieved and uniformity of application is vital if CISG is to maintain its international character.

The ultimate aim of CISG, and arguably the reason for its existence, is to achieve the broadest degree of uniformity in the law for international sale transactions.[347] Its adoption by the Contracting States is a necessary but not sufficient step towards that

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[346] The educational role of universities is discussed in more depth later in this chapter, in section 6, *infra*, which deals with the available remedies against divergent interpretations of CISG.

[347] The purpose behind uniformity is not just to create a pleasing vision of symmetry. Chapter 1 of this work deals with the need for, and the benefits of, uniformity in international commercial law. *See also*

aim. What is also necessary is that CISG, once incorporated into the various domestic legal systems, is read, interpreted and understood in the same uniform way by all its users, in any of the Contracting States.[348] It is part of the present writer's thesis that this can not be achieved if national principles, or concepts, taken from the law of the forum, or from the law which in the absence of CISG would have been applicable according to the rules of private international law, are allowed to be used in the interpretation of CISG. In fact, a "nationalistic" approach to the interpretation of CISG would achieve results that are contrary to what was intended to be achieved by the creation of the uniform law and would foster the emergence of divergent national interpretations.[349] The "nationalisation" of the uniform rules deprives the instrument of its unifying effect.

The negative consequences of a "nationalistic" interpretation have also been pointed out by courts. The House of Lords, in Scruttons Ltd. v.Midland Silicones Ltd., stated that:

> "it would be deplorable if the nations, after protracted negotiations, reach agreement...and that their several courts should then disagree as to the meaning of what they appeared to agree upon."[350]

The dangers concerning the interpretation of CISG have been attributed to "a natural tendency to read the international text through the lenses of domestic law."[351] This can be the result of a conscious, or unconscious, inclination of judges to place the uniform law against the background of their own municipal law (*lex fori*) and to interpret the uniform law on the basis of principles with which they are already familiar, thus threatening the goal of international uniformity in interpretation. Among other causes that can give rise to diverging interpretations of a uniform law are problems which are "internal" to the uniform law, since they have their source in the uniform law itself. Such divergences in interpretation are "normal" results of defects in the drafting of the uniform rules, mistakes in grammar and translation, lack of clarity, or gaps in the law. In this regard, it has been pointed out that the existence of different official versions of the same uniform law is a circumstance which can, by

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V.S.Cook, Note, "The need for Uniform Interpretation of the 1980 United Nations Convention on Contracts for the International Sale of Goods", 50 *U. Pitt. L. Rev.* (1988) 197, at 216.

[348] For a similar conclusion, *see* Bonell (1987), *supra* note 113, at 74-75.

[349] For a similar conclusion, *see* Ferrari (1994), *supra* note 39, at 203.

[350] [1962] A.C. 446, at 471.

[351] J.Honnold, "The Sales Convention in Action - Uniform International Words: Uniform Application?", 8 *J.L.& Com.* (1988) 207, at 208.

itself, give rise to interpretative doubts because "textual differences...impede uniformity."[352]

Other reasons that can lead to divergent interpretations are "external", since they are independent from the uniform law itself. On this aspect, it has been said that some interpretative differences can result from various national interests that the different interpreters want to prevail over the national interests of other States. In relation to CISG, it has been asserted that "the disparity of economic, political, and legal structure of the countries represented at the Vienna Conference suggests the difficulty of achieving legal uniformity."[353]

Summarising the conclusions of the above analysis of the first two elements of Article 7(1) CISG, it may be said that the recognition of the autonomy of international sales law and its international characterisation are interconnected and that they both serve the uniformity of interpretation and application of the Convention. The recognition of the autonomy of CISG contributes to the accomplishment of UNCITRAL's directives for the interpretation of the Convention as stated in the wording of Article 7(1) CISG.

5. THE OBSERVANCE OF GOOD FAITH IN INTERNATIONAL TRADE

According to the third element of Article 7(1) CISG, in interpreting the provisions of the Convention one must have regard to the need of promoting the "observance of good faith in international trade". The legislative history of Art.7(1) shows that the final inclusion of the good faith principle represented a compromise solution between those delegates to the Vienna Convention who supported its inclusion – stating that, at least in the formation of the contract, the parties should observe the principles of "fair dealing" and act in "good faith" – and those who were opposed to any explicit reference to the principle in the Convention, on the ground that it had no fixed meaning and would lead to uncertainty and non-conformity.[354]

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[352] M.F.Sturley, "International Uniform Laws in National Courts: The Influence of Domestic Law in Conflicts of Interpretation", 27 *Va.J.Int'l. L.* (1986) 729, at 731.
[353] A.Garro, "Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods", 23 *Int'l. Law.* (1989) 443, at 450.
[354] *See* Honnold (1991), *supra* note 53, at 146; *see also* Bonell (1987), *supra* note 113, at 83-84.

The concept of good faith and its scope and function in different legal systems was discussed earlier.[355] However, there are some issues concerning the final inclusion of the principle of good faith in CISG that need to be explored further, in order to determine the nature, scope and meaning of this much-debated principle in the application and interpretation of CISG.

(a) "Good faith" as a mere instrument of interpretation

The placement of the good faith principle in the context of an operative provision dealing with the interpretation of CISG creates uncertainties as to the principle's exact nature, scope and function within CISG. Scholarly opinion on the issue is divided. Some commentators insist on the literal meaning of the provision and conclude that the principle of good faith is nothing more than an additional criterion to be used by judges and arbitrators in the interpretation of CISG.[356] Under this approach, good faith is merely a tool of interpretation at the disposal of the judges to neutralise the danger of reaching inequitable results.

But even if included in CISG as a mere instrument of interpretation, good faith can pose problems in achieving the ultimate goal of CISG – uniformity in its application – because the concept of good faith has not only different meanings between different legal systems but also multiple connotations within legal systems.[357] Consequently, it will be difficult for a uniform definition of the concept to be developed and this can lead to differing interpretations of CISG.[358]

(b) "Good faith" in the relations between the parties

On the other hand, there is academic opinion favouring a broader interpretation of the reference to good faith as contained in Article 7(1) CISG, pointing out that the duty to observe good faith in international trade is also "necessarily directed to the parties to each individual contract of sale."[359]

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[355] *See* Chapter 2 of this work, *supra*.

[356] *See* A.Farnsworth, "The Convention on the International Sale of Goods from the Perspective of the Common Law Countries", in *La Vendita Internazionale, La Convenzione di Vienna dell' 11 Aprile 1980* (Milan: A.Giuffre Editore, 1981) 5, at 18 who speaks of "seemingly harmless words". *See also* Winship (1984), *supra* note 216, at 67; G.Eorsi, "A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods", 31 *Am.J.Comp.L.* (1983) 333, at 349, who is of the opinion that the provision as it now stands represents "a strange compromise, in fact burying the principle of good faith".

[357] For a criticism of the vagueness of the concept of good faith *see, e.g.*, Rosett (1984), *supra* note 117, at 289.

[358] For similar conclusions, *see, e.g.*, Dore & De Franco (1982), *supra* note 86, at 63; Eorsi (1979), *supra* note 283, at 314.

[359] *See* Bonell (1987), *supra* note 113, at 84. For similar statements, *see* P.Schlechtriem, *Uniform Sales Law: The U.N. Convention on Contracts for the International Sale of Goods* (Manzsche Verlags

The main theoretical difficulty with this suggestion is that, in effect, it implies that the interpreters of CISG are not only the judges, or arbitrators, but the contracting parties as well.[360] This point is controversial and there are practical and theoretical objections to it. If Article 7 CISG is addressed to the parties, then that provision might be excluded by them under Article 6 CISG. This would be an unwelcome result because, in practice, this would hinder the uniformity of interpretation. The theoretical objection is that the statement seems to obliterate the distinction between interpretation by the court and performance of the contract by the parties. One of the main practical objections to the inclusion in CISG of a provision imposing on the parties a general obligation to act in good faith was that this concept was too vague and would inevitably lead to divergent interpretations of CISG by national courts. The principle of good faith operates differently within different national legal systems.[361] For example, in the Unites States its relevance is formally limited to performance and enforcement of the contract.[362] On the other hand, in most of the civil law systems, as well as in socialist systems, the principle of good faith is not limited to performance but also extends to the formation and interpretation of contracts.[363] Moreover, even between civil law systems the specific application of the principle of good faith in practice may differ considerably.[364]

Bonell, one of the principal exponents of the thesis that attributes wider importance to the inclusion of the principle of good faith in CISG, explains that, even as a simple

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und Universitatsbuchhandlung, Vienna, 1986) 39; D.Maskow, "The Convention on the International Sale of Goods from the Perspective of the Socialist Countries", in *La Vendita Internazionale, La Convenzione di Vienna dell' 11 Aprile 1980* (Giuffrè, Milan, 1981) 41, at 54-57. *Cf.* the evaluation offered by Rosett, in Rosett (1984), *supra* note 117, at 290.

[360] *See* Enderlein & Maskow (1992), *supra* note 331, at 55.

[361] For further references, *see* Newman, "The General Principles of Equity", in Newman (ed.), *Equity in the World's Legal Systems: A Comparative Study* (Bruylant, Brussels, 1973) 589 *et seq.*

[362] *See* § 1-203 of the United States Uniform Commercial Code, where it is stated that "every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement". However, there are some cases in which United States courts have imposed on the parties a "duty to bargain in good faith"; *see* A.Farnsworth, *Contracts* (Little, Brown & Co., Toronto – Boston, 1982) 187 *et seq.*

[363] For a comparative discussion of good faith in the bargaining and formation process, *see*, e.g., A. Farnsworth, "Precontractual Liability and Preliminary agreements - Fair Dealing and Failed Negotiations", 87 *Colum. L. Rev.* (1987) 217.

[364] *See, e.g.*, §§ 157 and 242 of the Federal Republic of Germany Civil Code; Articles 1337-1338 and 1375 of the Italian Civil Code; Articles 6.1.1.2.1., 6.5.3.1.1. and 6.5.3.1.2. of the Dutch Civil Code. These references are provided by Bonell (1987), *supra* note 113, at 86, who also makes an observation on the considerable disparity in the volume of the case law developed by German Courts in application of §242 of the Civil Code, concerning issues such as "*culpa in contrahendo*", abuse of rights, hardship and unconscionable contract terms, as compared to the case law dealing with similar provisions in the judicial practice of other countries.

aid to the interpretation of CISG's specific provisions, the principle of good faith may have some impact on the behaviour of the parties – for instance, in cases where a party is prevented from invoking rights and remedies normally granted to him under CISG.[365] Such a view is supported by Honnold's argument that a party to an international contract of sale governed by CISG, who demands specific performance within an additional period according to Articles 47 or 63 CISG, may not, in good faith, refuse to accept the performance that he requested. [366] It is further suggested that compelling specific performance, or avoiding a contract after a market change[367] that permits a party to speculate at the other's expense, "may well be inconsistent with the Conventions provisions governing these remedies, when they are construed in the light of good faith."[368]

Further support for the argument that the relevance of the principle of good faith is not limited to the interpretation of CISG is offered by the observation that there can be found within CISG a number of provisions which constitute a particular application of the principle of good faith, thus confirming that good faith is also one of the "general principles" underlying CISG as a whole, for purposes of gap-filling (as per Article 7(2) CISG).[369] However, a distinction must be drawn between good faith in the interpretation of CISG (Art. 7(1)) and good faith as a general principle upon which CISG is based (Art. 7(2)). The argument in favour of extending the scope of good faith to the behaviour of the parties and attributing to it the quality of a "general principle" of the CISG[370] runs the risk of being driven to the conclusion that, as such, the principle of good faith in Article 7(2) CISG may even impose on the parties "additional obligations of a positive character".[371]

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[365] *See* Bonell (1987), *supra* note 113, at 84.

[366] *See* Honnold (1982), *supra* note 268, at 125.

[367] However, unlike English law, there is little scope for avoidance after a market change because of Article 25 CISG.

[368] Bonell (1987), *supra* note 113, at 84. Bonell is of the opinion that even contractual agreements or usages might be disregarded if their application in accordance with Articles 6 and 9 CISG would in the specific case appear to be contrary to good faith; *ibid.*, at 85.

[369] For a list of further applications of the good faith principle in particular provisions of CISG, *see* the *Official Records* of the U.N. Conference on Contracts for the International Sale of Goods, Vienna, vol. I, (1981) 18, where the Secretariat's Commentary makes reference among others, to Articles 19(2) [which became final Arts. 27(2)], 35 and 44 [which became final Arts. 37 and 48], 38[which became final Art. 40]. 45(2) [which became final Art. 49(2)], 60(2) [which became final Art. 64(2)], and 67[which became final Art. 82], 74[which became final Art. 85] and 77[which became final Art. 88].

[370] *See* Dore & De Franco (1982), *supra* note 86, at 61, where the authors state that the good faith provision does not constitute a mere instrument of interpretation, but rather, it "appears to be a pervasive norm analogous to the good faith obligation of the U.C.C."

[371] Bonell (1987), *supra* note 113, at 85. According to Bonell, "this will be the case, if during the negotiating process or in the course of performance of the contract a question arises for which the

(c) Arguments against the imposition on the parties of a positive duty of good faith imposing further obligations of a positive character on the parties

It is the opinion of the present writer that the possibility of imposing on the parties additional obligations must not be admitted, because this is clearly not supported by the legislative history of CISG. Article 7(1), as it now stands in CISG's text, is the result of a drafting compromise between two diverging views, which reflects the political and diplomatic manoeuvring necessary for the creation of an international Convention. It can not now be made to take the meaning originally suggested by those advocating the imposition of a positive duty of good faith on the parties, because this would be reversing the intent of the compromise. On the other hand, this does not mean that the opposite view (*i.e.*, that good faith represents merely an instrument of interpretation) should be adopted instead, because this would be unnecessarily denying the value of good faith and its potential function within CISG. It is part of the present writer's thesis that what is needed is a balanced approach to the doctrine of good faith, so that it is neither condemned to do too little nor allowed to do too much. The parties' behaviour must be measured on a standard of good faith, limited by the Convention's scope of application *ratione materiae*.[372] Good faith, like all the other terms in CISG, must be approached afresh and be given a new definition which will be describing its scope and meaning within CISG, separated from the peculiar loads that it carries in different, and often within, legal systems. It may take some time for the principle of good faith to be developed naturally and to crystalise in the case law, in the spirit of continuing deliberation and discourse that characterises the community of CISG members. Until then, perhaps the most balanced position to adopt is that uttered by Maskow:

> "... the most objective criterion for what the principle of good faith in international trade means is the Convention itself."[373]

(d) The "international trade" qualification to the principle of "good faith"

Attention must be paid to the functional value of the qualification to the "observance of good faith", made by the additional words "in international trade", as inserted in

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Convention does not contain any specific provision and the solution is found in applying, in accordance with Article 7(2), the principle of good faith", *ibid.*

[372] *See* Ferrari (1994), *supra* note 39, at 215.

[373] Maskow (1981), *supra* note 359, at 55.

Article 7(1) CISG. There are two points that can be made about the reference to "good faith in international trade".

The first point is that the principle of good faith may not be applied according to the standards ordinarily adopted within the different national systems.[374] This point can be illustrated by the following example. Under German law, when a party to a sales contract becomes the recipient of a written communication, claiming to constitute a simple confirmation of the prior oral agreement between the parties to the contract, but in fact containing additional or different terms, the recipient is under a duty immediately to object to these terms if he does not want to be bound by them.[375] However, in other legal systems such a rule is either entirely unknown,[376] or limited to the case in which the additional or different terms do not materially alter the content of the earlier agreement.[377] Therefore, it is highly unlikely that such a rule could ever be applied to a contract of sale governed by CISG.[378]

The second point is that the principle of good faith as expressed in CISG must be construed in the light of the special conditions and requirements of international trade. There are two things to be said on this second point. Firstly, CISG specifically governs commercial contracts only and all consumer transactions are expressly placed outside the ambit of its operation.[379] Even domestic laws generally make a distinction in the application of the principle of good faith in commercial contracts (contracts between merchants) compared to consumer transactions. Rules applicable to consumer transactions, intended to protect the economically weaker or inexperienced party, are for the most part excluded when both parties contract in their professional capacity.[380] And in the case of a transaction between merchants, the general obligation to act in good faith is often understood in the sense of

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[374] As will also be said in connection with the specification of the principles underlying the CISG in general (*see* the discussion on Article 7(2) CISG, Chapter 4, *infra*), such national standards may be taken into account only to the extent that they prove to be commonly accepted at a comparative level; *see* Bonell (1987), *supra* note 113, at 86.

[375] *See* Bonell (1987), *supra* note 113, at 86; Schlesinger *et al.*, (1968), *supra* note 281, at 1160 *et seq.* (Report on Austrian, German and Swiss law).

[376] *See* Schlesinger, *ibid.*, at 1120 (Report on English, Australian, Canadian and New Zealand law).

[377] *See, e.g.*, § 2-207 (2) of the United States Uniform Commercial Code.

[378] Bonell (1987), *supra* note 113, at 87, states that such a rule, at the most, "may be invoked by the sender of the written communication if he proves that a similar application of the principle of good faith is generally accepted not only in his own country but also in the country where the recipient has his place of business."

[379] *See* Article 2 CISG.

[380] *See* § 1 of the Swedish Unfair Contract Terms Act (1971); §2 and §§ 10-12 of the Federal Republic of Germany Act on Standard Forms of Contract (1976); Sections 3, 5-7 of the United Kingdom Unfair Contract Terms Act (1977).

imposing special standards, such as "the observance of reasonable commercial standards of fair dealing."[381] Secondly, there is a further distinction that needs to be made. CISG deals only with international commercial transactions. The significance of this point lies in the fact that substantial differences exist between commercial transactions of a purely domestic nature and transactions concluded at an international level. This point is taken on board by Bonell, who goes as far as saying that in the case of a sales contract between an exporter from a highly industrialised country and an importer from a developing country

> "... it may well be that the discrepancy between the bargaining power of the two parties corresponds to that normally to be found in a consumer transaction stipulated at national level".[382]

This statement may well be too sweeping and it runs the risk of oversimplifying the differences between national and international trade. It attempts to establish that the distinction generally made within domestic laws between consumer transactions and contracts of a commercial nature can be used in order to determine the precise meaning of "good faith in international trade". This implies that the interpretation of CISG could be used to protect the weaker party.[383] It is doubtful that this would work at international level. Although it is generally accepted that differences in the bargaining power of parties to an international contract exist, and that these differences are usually related to the parties' role in the contract (*i.e.*, importing, or exporting) and to their technological sophistication and/or economic environment (*i.e.*, coming from industrialised, or developing countries), to equate such an international commercial relationship to a domestic consumer transaction may be stretching any comparative value of such an analogy beyond its legitimate limits. In contractual relations between industrialised and developing countries, it may not always be the party from the developing country who is the weaker party.[384] Further, it is not easy to identify the interest of all developing countries unequivocally, because they do not constitute an undifferentiated mass of countries with the same

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[381] *See* § 2-103 (b) of the United States Uniform Commercial Code.
[382] Bonell (1987), *supra* note 113, at 87.
[383] Eorsi seems to want to make the same implication, *see* G. Eorsi, "The Method of Unifying the Law on the International Sale of Goods". *National Report of Hungary for the Twelfth International Congress of Comparative Law - Sydney* (August 1986), at 35.
[384] *See* Enderlein (1988), *supra* note 330, at 342, where he notes that much depends on the goods to be sold or purchased, offer and demand, etc.

economic interest.[385] Therefore, without completely discounting the generic imbalance that frequently exists between developed and developing countries, problems arising out of the unification of international sales law and affecting developing, or third world, countries can not always be determined in advance. A further element that discounts the value of such an analogy is the diversity exhibited in the standards of business in different parts of the world. As has been correctly remarked, this lack of uniformity in the domestic, or regional, standards of business around the world entails that

> "a particular line of conduct, which may reasonably be expected from merchants operating in the same country or region, could hardly be imposed on a party belonging to a country with a different economic and social structure."[386]

It follows that though there may be some value in the comparative use of the distinction made within domestic laws between commercial and consumer transactions, in an effort to determine the precise meaning of "good faith in international trade", such an analogy has inherent limitations that should not be forgotten, or underestimated. International trade is characterised by intense competition and arm's length dealings and it is in that context that the Convention operates and must be interpreted. Observance of good faith in international trade should not be equated with the establishment of material justice between the parties. Rather, it should imply the "observance of such a conduct as is normal among [international] tradesmen."[387] It is part of the present writer's thesis that the reference in Article 7(1) to the "observance of good faith in international trade" carries only descriptive and not normative value. It is addressed to the interpretation of CISG's provisions and seeks to describe good faith in international trade as it is used, rather than state what it should be; it is not (and can not) be concerned with establishing a

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[385] For example, Brazil and India export plant machinery and other manufactured products, not conforming to the traditional archetype of a developing country that exports raw materials and imports finished consumer goods. Other developing countries, such as Ghana, invest in import-substitution industries and are encouraged by government policy to export some of their products. *See* S.K.Date-Bah, "Problems of the Unification of International Sales Law from the Standpoint of Developing Countries: Problems of Unification of International Sales Law", 7 *Digest of Commercial Laws of the World* ((Dobbs Ferry: New York, 1980) 39.

[386] Bonell (1987), *supra* note 113, at 87.

[387] *See* D. Maskow, "On the Interpretation of the Uniform Rules of the 1980 U.N. Convention on Contracts for the International Sale of Goods", *National Report of the German Democratic Republic for the Twelfth International Congress of Comparative Law - Sydney* (August 1986), at 18. Enderlein also agrees with Maskow on this point: *see* Enderlein (1988), *supra* note 330, at 342.

norm regarded as a standard of correctness in international trade for the reasons discussed in preceding sections of the this thesis. [388]

Further indications as to the precise meaning of the third part of Article 7(1) CISG may be found within CISG itself. One such reference is provided by the wording of the CISG Preamble, which expressly states that

> "... the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States..."

and that

> "... the adoption of uniform rules which ... take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade ..."

It is the view of the present writer that this reference reinforces the point made above, that the observance of good faith in international trade is delineated by the parameters of international commercial transactions. Thus, the principle of good faith may not be applied according to the standards ordinarily adopted within the different national systems and must be construed in the light of the special conditions and requirements of international trade. The reference to "equality" should not be equated with the imposition of positive duties upon the parties, as this would be incompatible with the quintessential nature of commercial transactions and the legislative history of CISG; rather, it implies the observance of such a conduct as is acceptable among international tradesmen contracting freely with each other.

6. REMEDIES AGAINST DIVERGENT INTERPRETATIONS

International trade law is subject to the tension between two forces – "the divisive impact of nationalism and our unwillingness to confine our activities within national

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[388] *See* sections titled *"Conclusions"*, in UNIDROIT PRINCIPLES, GOOD FAITH AND CISG, Chapter 2, *supra*, at pp. 80-1 (concluding that good faith in Article 7 CISG is circumscribed to the interpretation of the law and should not be allowed to impose additional duties of a positive nature to contracting parties), and *"Arguments against the imposition on the parties of a positive duty of good faith imposing further obligations of a positive character on the parties"*, in THE OBSERVANCE OF GOOD FAITH IN INTERNATIONAL TRADE, Chapter 3, *supra*, p.119. As is concluded later in the current section, the reference to "good faith in international trade" implies the observance of such conduct as is acceptable among international tradesmen contracting freely with each other and should not be equated with the imposition of positive duties upon the parties, as this would be incompatible with the quintessential nature of commercial transactions and the legislative history of CISG, *infra*, p. 123.

borders."[389] Even if there are universal principles of right and justice, national laws responding to these principles are expressed in words and concepts that have developed from diverse human experiences and in diverse socio-legal contexts.

The CISG attempts to establish uniform international rules for the international sale of goods, in order to minimise the uncertainties and misunderstandings in commercial relationships that result from two basic problems:

(1) uncertainty over which domestic law applies in case of a dispute, and

(2) uncertainty over the proper application of a wide range of foreign legal systems by a domestic tribunal, or court.

It has been maintained throughout this thesis that the idea that CISG's international origin and character demand that it be interpreted differently from domestic legislation is only a pre-condition for its uniform application in practice. Uniformity does not result automatically from an agreement on the wording of the uniform rules. The objectives of the agreement can be undermined by different national approaches to interpreting and applying the uniform international rules. For a uniform application of CISG to be attained, it does not suffice that CISG is considered an autonomous body of law, since it could still be interpreted in different autonomous ways in various States. If such an unfortunate scenario were developed, uniformity would be attained only as a "very unlikely coincidence".[390] In theory there exists a wide range of remedies against such a risk,[391] but in practice it will be up to the national judges and arbitrators interpreting CISG to attain, and then maintain, its uniform application to the highest degree possible.

There are some interpretative aids at the disposal of the interpreters of CISG that may assist in the maintenance of its uniform application and may act as a hindrance to the development of divergent interpretations. For example, in case of ambiguities or obscurities in language, the existence of several equally authentic language versions of the Convention permits the interpreter to consult another official version

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[389] J.Honnold, "Uniform Words and Uniform Application. The 1980 Sales Convention and International Juridical Practice", in *Einheitliches Kaufrecht und Nationales Obligationrecht*, (P. Schlechtriem, ed.), (Baden-Baden, Nomos Verlagsgesellschaft: 1987) 115-146, at 119.

[390] Ferrari (1994), *supra* note 39, at, 204, where the author uses the following numerical example to illustrate this point: Supposing that there are three equally plausible autonomous interpretations of the same provision, the chance that two interpreters construing the same provision independently will arrive at a uniform result amounts only to 33%, while the probability of diverging interpretations is 67%.

[391] *See* David (1971), *supra* note 41, at 107-122.

of the CISG for assistance.[392] What follows is an examination of different means that can be utilised in the battle against divergent interpretations of CISG.

(a) Jurisprudence (Case law)

Arguably the most effective means of achieving uniformity in the application of CISG consists in having regard to the way it is interpreted in other countries.[393] The development of a body of case law based on the provisions of CISG and the careful consideration of this jurisprudence by later courts are very important steps in the process of interpretation of CISG. A judge, or arbitrator, faced with a particular question of interpretation of CISG's provisions, which may have already been brought to the attention of a court in another Contracting State, should take into consideration the solutions so far elaborated in the foreign courts. Given also the lack of machinery for legislative amendment in CISG, the importance of case law in understanding international sales law will be all the greater. Thus, it is arguable that as a matter of principle and common sense courts should, at least, consider the jurisprudence developed by foreign courts applying CISG.[394] The difficulty lies in the importance (*e.g.*, binding force, or merely persuasive value) that a court should place on a decision of a foreign court and the reasoning behind that decision, and the degree to which any such precedent may be followed and adopted by other foreign courts.[395]

This approach may encounter difficulties in practice, due to the relatively small number of judicial decisions relating to CISG and the effectiveness of the distribution of any such decisions internationally. On the first issue, it can only be hoped that, as the number of States adopting CISG grows even further and the use of

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[392] *See* Bonell (1987), *supra* note 113, at 90, who is of the opinion that such comparison "becomes obligatory, if the text actually applied is only a translation into a national language which is not one of the official languages of the United Nations".

[393] The tendency of national tribunals to apply law in accordance with ingrained national patterns was discussed at the Twelfth International Congress of Comparative Law (Sydney, Australia 1986).

[394] For the necessity of having regard to other countries' decisions see: A.H. Kritzer, *Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods* (Kluwer, Deventer & Boston, 1989) 109. The domestic legislative instruments in most common law countries are traditionally interpreted narrowly so as to limit their interference with the law developed by the courts; *see* Cook (1988), *supra* note 347, at 199.

[395] For examples of court decisions in the United States, United Kingdom, Switzerland, Federal Republic of Germany, Belgium, Austria and Italy, which for the interpretation of existing uniform laws relied – although to a different extent – on foreign case law and scholarship, *see* Bonell (1987), *supra* note 113, at 91, where the author cites Giles, *Uniform Commercial Law. An Essay on International Conventions in National Courts*, (A.W.Sijthoff, Leyden, 1970), 35 *et seq.* Also, *see* Bonell (1978), *supra* note 294, at 11.

CISG becomes even more widespread, more cases seeking solution will reach judges and arbitrators.

In 1988, UNCITRAL, in its twenty-first working session, decided to establish a procedure in which the decisions rendered in the application of the uniform law in the various contracting States are gathered by, so called, "national correspondents", who then send to the UNCITRAL Secretariat the full text of the decisions in their original languages so that the Secretariat can make these decisions accessible to any interested persons.[396] The Commission also adopted a procedure for the distribution of information about the decisions, by requesting from the national correspondents to prepare abstracts of the decisions emanating from their country, which can then be translated by the U.N. into the six official languages and published as part of the regular documentation of the Commission.[397]

The UNCITRAL Secretariat regularly releases and circulates abstracts of the decisions, under the name CLOUT, prepared by national reporters of countries that have adopted the Convention.[398] A special feature of these abstracts is their translation from less known languages (*e.g.*, Hungarian) into one of the six U.N. languages – for example, English.

Another exceedingly helpful source for decisions, and related information, is the UNILEX database, prepared at the Centre for Comparative and Foreign Law Studies in Rome by a team organised by Professor Bonell.[399] UNILEX,[400] a "reasoned collection of case law and an international bibliography on the CISG",[401] presents, both on disk and on paper, features similar to those found on the internet under the foregoing sites.

Another valuable site of CISG-related information was prepared at Pace University by Professor Kritzer and colleagues, and is available on the Internet.[402] This site provides, at no cost, the text of CISG, a current list of Contracting States and the

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[396] *See* "Report of UNCITRAL on the Work of its Twenty-First Session" (1988) 98.

[397] *See* Honnold (1991), *supra* note 53, at 145.

[398] The U.N. identification for this is: A/CN.9/SER.C/ABSTRACTS/1-13. This and other UNCITRAL material may be obtained from its website: http://www.un.or.at/uncitral

[399] For information on procuring this service, contact: [Transnational Publishers, Inc., One Bridge Street, Irvington-on-Hudson, NY 10533; fax (914) 591-2688].

[400] For a comment on UNILEX as a tool to promote the CISG's uniform application, *see* F.Liguori, "'UNILEX': A Means to Promote Uniformity in the Application of CISG", in *Zeitschrift für Europäisches Privatrecht* (1996) 600.

[401] M.J.Bonell & F.Liguori, "The U.N. Convention on the International Sale of Goods: A Critical Analysis of Current International Case Law (Part I)", *Uniform L. Rev.* (1996) 147, at 147, fn.1.

[402] This website can be found at http://www.cisg.law.pace.edu

most up-to-date bibliography on the CISG, as well as case law from all over the world.[403] Similar web-sites have been created in Germany[404] and in France.[405] Recognising the importance of foreign decisions to the uniform interpretation of CISG, the *Journal of Law and Commerce* has translated cases and provided commentaries as European courts and arbitration have begun interpreting various provisions of the Convention.[406]

A wealth of information about the decisions can be found in the remarkable articles and volumes of thoughtful writing that the Convention has inspired. UNCITRAL has provided a bibliography of recent publications that includes sixty-one recent books and articles on the CISG.[407] This massive outpouring of writing about the Convention is a testimonial to the world-wide interest in international legal unification.

Focusing on the substantive issue of consideration and evaluation of existing case law on the interpretation of CISG's provisions, the basic question that needs answering regards the reaction of a judge, or arbitrator, who, faced with an issue of interpretation in CISG, discovers that divergent solutions have been adopted in regards to that same issue by different national courts. The prevailing view is that, as long as the divergences are rather isolated and rendered by lower courts, or the divergences are to be found even within one and the same jurisdiction, "it is still possible either to choose the most appropriate solution among the different ones so far proposed or to disregard them altogether and attempt to find a new solution."[408]

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[403] For a description on how this, as well as other Internet sites dealing with the CISG, are to be used, *see* C.M.Germain, "The United Nations Convention on Contracts for the International Sale of Goods: Guide to Research and Literature", *Cornell Rev. of the Convention on Contracts for the International Sale of Goods* (1995) 117; A.H.Kritzer, "The Convention on Contracts for the International Sale of Goods: Scope, Interpretation and Resources", *Cornell Rev. of the Convention on Contracts for the International Sale of Goods* (1995) 147.

[404] *See* CISG Online: http://www.jura.uni-freiburg.de/iprl/cisg

[405] *See* CISG-France: http://www.jura.uni-sb.de/FB/LS/Witz/cisg.htm

[406] *See Oberlandesgericht,* Frankfurt am Main, Sept. 17, 1991-SU 164/90 (Germany), translated in 12 *J.L. & Com.* (1993) 261; V.Behr, "Commentary to Journal of Law & Commerce - Case I: *Oberlandesgericht* Frankfurt am Main", 12 *J.L. & Com.* (1993) 271; *Landgericht*, Baden-Baden, Aug. 14, 1991-40 113/90 (Germany), translated in 12 *J.L. & Com.* (1993) 277; *Metropolitan Court Budapest Marko U.* 27 1363 BP. P.O.B. 16. Docket No. 3.G.50.289/1991/32 (Budapest), translated in 13 *J.L. & Com.* (1993) 49; J.J.Callaghan, "Recent Developments: CISG: U.N. Convention on Contracts for the International Sale of Goods: Examining the Gap-filling role of CISG in Two French Decisions", 14 *J.L. & Com.* (1995) 183.

[407] *See* A/CN/441, 4 March 1997. *See also* M.R.Will, *International Sales Law under CISG: The First 555 or so Decisions* (8th ed., Geneva, 1999).

[408] Bonell (1987), *supra* note 113, at 92.

The treatment that CISG will receive from common law and civil law jurisdictions alike and the resolution of conflicting CISG precedent, are issues of catalytic importance for the emerging CISG jurisprudence and for its role in achieving and maintaining the desired uniformity of interpretation and application of CISG.[409]

Common law jurisdictions and international precedent

The United Kingdom applies the notion of "*stare decisis*" (binding precedent). Trial courts are bound by decisions of the House of Lords and the Court of Appeal, but not by their own decisions. The House of Lords usually follows its own previous decisions, although it is not bound to do so and can distinguish a previous decision it disapproves. Traditionally, courts in the United Kingdom have given relatively little weight to the interpretation of uniform laws by courts in other adhering States,[410] while the decisions of the House of Lords, the English Court of Appeal and the Privy Council have always carried persuasive authority in Australia[411], Canada[412], New Zealand[413] and Singapore[414] – especially in relation to commercial matters having an international impact, where it has been recognised that uniformity is highly desirable. At the Twelfth International Congress of Comparative Law, in 1986, Professor Sutton stated that although Australian courts would seek to follow "a body of case law" from civil law courts interpreting CISG, if the decisions were in conflict the courts would tend to follow the view prevailing in the common law English speaking jurisdictions.[415]

The doctrine of *stare decisis* has always been part of Canadian common law, although provincial courts of appeal are starting to break down the tradition of being

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[409] *See* Chapter 5, *infra*, for discussion on the (not so encouraging) available evidence concerning the practice of citing and consulting foreign decisions on CISG among national courts.

[410] *See* Honnold (1987), *supra* note 389, at 121, where he cites M.Clarke, *U.K. National Report to the Twelfth International Congress of Comparative Law* (Sydney, Australia 1986). Until recently, this tradition has been followed even in applying international transport Conventions – the Hague Rules and the Warsaw Convention.

[411] *See* Honnold (1987), *ibid.*, at 121, where he cites K.Sutton, *Australian National Report to the Twelfth International Congress of Comparative Law* (Sydney, Australia 1986).

[412] *See* Honnold (1987), *ibid.*, at 121, where he cites J.S.Ziegel, *Canadian National Report to the Twelfth International Congress of Comparative Law* (Sydney, Australia 1986).

[413] *See* Honnold (1987), *ibid.*, at 121, where he cites J.H.Farrar, *New Zealand National Report to the Twelfth International Congress of Comparative Law* (Sydney, Australia 1986).

[414] *See* Honnold (1987), *ibid.*, at 121, where he cites W.L.H.Khoo, *Singapore National Report to the Twelfth International Congress of Comparative Law* (Sydney, Australia 1986).

[415] *See* Honnold (1987), *ibid.*, at 122, where he cites Sutton, *Australian National Report to the Twelfth International Congress of Comparative Law* (1986), at 4.

bound by their own decisions.[416] Canadian courts were expected to be receptive of case law in civil law jurisdictions. Common law jurisdictions in Canada have been introduced to the civil law by contact with the law of Quebec[417], and the theoretical differences between common law and civil law jurisdictions concerning the binding nature of precedent seem to have little practical significance. In Quebec, "the doctrine and practice of precedent is remarkably close to that of the common law".[418] The use of civil law experience in dealing with uniform international rules would be further encouraged by a line of United Kingdom decisions, culminating at the House of Lords with Fothergill v. Monarch Airlines,[419] which will probably be followed in the other jurisdictions of the Commonwealth.

Civil law jurisdictions and international precedent

In some civil law jurisdictions, court decisions have less binding effect than in common law countries, at least in theory.[420]

In France, Article 5 of the Code Civil forbids courts from pronouncing for the future in a general and rule-making way. Thus, not even the *Cour de Cassation* can lay down precedent. The *Cour de Cassation* can quash lower courts' judgments in appropriate cases and, after a second reference, it can substitute its own decision if the lower court refuses to follow its direction. A stream of case law ("*jurisprudence constante*") has a persuasive effect, but no more than this. The French distinguish between sources of law (statute, custom) and legal authorities (case law, doctrine).

In the Netherlands, *de jure* Dutch law denies binding authority to court decisions. However, *de facto* the courts accept binding authority of decisions of superior courts, especially decisions of the *Hoge Raad*. According to Professor van der Velden, "there is no reason to expect a different attitude towards decisions of uniform law

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[416] *See* Honnold (1987), *ibid.*, at 124, where he cites Ziegel, *Canadian National Report to the Twelfth International Congress of Comparative Law* (1986), 4(b) at 3; *see also* J.S.Ziegel, "Comment" in 63 *Can. Bar Rev.* (1985) 629, at 634.

[417] *See* Honnold (1987), *ibid.*, at 122, where he cites C.Samson, *National Report of Canada and Quebec to the Twelfth International Congress of Comparative Law* (Sydney, Australia 1986), at note 35 *et seq*. Canadian cases have relied on civil law interpretation of the international Hague rules on carriage of goods by sea.

[418] W. Friedman, 31 *Can. Bar Rev.* (1953) 723, at 746; *see also* J.S.Ziegel, 63 *Can. Bar Rev.* (1985) 629, at 634.

[419] [1980] 2 All E.R. 696.

[420] *See* Honnold (1987), *supra* note 389, at 123, where he cites L.C.Arria, *Venezuela National Report to the Twelfth International Congress of Comparative Law* (Sydney, Australia 1986), at 2.1.4.1.

courts".[421] In the Netherlands, there have been no instances in which Dutch courts stated that they relied on foreign courts in interpreting uniform law, even in cases where it seemed that foreign decisions were applicable. Professor van der Velden has concluded that, on this point, Dutch courts could learn from recent English decisions like the Fothergill case.[422]

The utility of comparative law research in interpreting uniform laws has been widely accepted in Polish legal writing.[423] A "generally accepted" approach to foreign courts' decisions and doctrine was illustrated by a 1975 decision of the Supreme Court interpreting the Guadalajara protocol to the Warsaw Convention on Air Carriage.[424]

Similarly, Bulgarian courts and the court of Arbitration for International Commerce in Sofia take account of the interpretation of international Conventions in other Contracting States to clarify the provisions of the conventions and to achieve uniformity of interpretation.[425]

Even though no mention is made in Article 7 CISG of the authority of decided cases, the exhortation in Article 7(1) to treat CISG as an international text and to promote uniformity in its interpretation will require deference to judicial opinions from other countries. This may not quite develop as a system of precedent, in the common law sense, but as common law courts must follow the wind of change in affording consideration to foreign precedent, so must civil law courts adjust their style as well. For example, the decisions of the *Cour de Cassation* are noted for their extreme brevity, explainable on the fact that they are not designed to persuade, or influence. In a new and unique jurisprudential system like CISG's, where case law will be at a premium, civil law courts have an obligation to expand their reasoning process if they are to transmit relevant persuasion to courts of other legal systems.

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[421] *See* Honnold (1987), *supra* note 389, at 124, where he cites F. J. A. van der Velden, *Netherlands National Report to the Twelfth International Congress of Comparative Law* (Sydney, Australia 1986) 22.

[422] *See* F.J.A. van der Velden, *Netherlands National Report to the Twelfth International Congress of Comparative Law* (Sydney, Australia 1986), at 24, fn. 53.

[423] *See* Honnold (1987), *supra* note 389, at 122, where he cites J.Rajski, *Poland National Report to the Twelfth International Congress of Comparative Law* (Sydney, Australia 1986), II, at note 12 (citing authorities).

[424] *See* J.Rajski, *Poland National Report to the Twelfth International Congress of Comparative Law* (Sydney, Australia 1986), at notes 13 and 14.

[425] *See* Honnold (1987), *supra* note 389, at 122, where he cites Popov, *Bulgaria National Report to the Twelfth International Congress of Comparative Law* (Sydney, Australia 1986), at IA, 47.

CISG and conflicting interpretations

The difficult questions facing national courts are whether they should defer even to earlier bad decisions of foreign courts and how to deal with precedent which is unsound. A possible dilemma to be faced is whether the cause of internationalism is more important than the suppression of bad precedent. Courts may be tempted to manipulate the line between law and fact in order to distinguish unsound decisions.

A more difficult state of affairs exists when the existing precedents consist of divergent interpretations that are part of a distinct set pattern between certain jurisdictions. In this scenario, some States favour a certain interpretation of a given provision of CISG, whereas some other States constantly adopt a different interpretation of the same provision. The predicament that arises for an interpreter of CISG in this instance is a serious one and its solution involves a re-evaluation of the basic principles of interpretation set out in Article 7(1) CISG. The interpretative dilemma facing the interpreter consists of, on the one hand, the doctrinal necessity of interpreting CISG "autonomously" and, on the other hand, the realistic compromise of making a choice between the different "national" interpretations.

This not so uncommon possibility of systematical divergence reveals the complexities of the issues concerning the application of an ambitious piece of international legislation that wishes to replace all existing law in its area of application and acquire its own autonomous interpretation.

Bonell[426] tries to analyse this issue by referring to a similar predicament that arose in relation to the Geneva Uniform Law on Bills of Exchange and Promissory Notes (1930). Article 31(4) of the 1930 Geneva Uniform Law gave rise to a difference of interpretation between various national jurisdictions. French and German courts applying the provision to bills of exchange drawn in their own country but payable in a foreign State, rejected the idea of an "autonomous" solution and referred to the interpretation usually given to the provision by the legal system designated according to the rules of private international law of the forum.

The decisions which relied on the application of the rules of private international law have been appropriately criticised on the ground that:

> "... in fields where uniform laws exist, and in dealings between States which have adopted these uniform laws, there is no longer a place for the

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[426] *See* Bonell (1987), supra note 113, at 92-93.

application of the conflict of laws approach."[427]

However, this criticism has itself been questioned. Bonell,[428] although recognising the necessity to interpret uniform laws "autonomously" in general, is of the opinion that an exception must be made if an insuperable divergence of interpretation of a particular provision of CISG exists between Contracting States:

> "To insist even in such an hypothesis on an 'autonomous' approach seems to be unrealistic, and in practice the result could easily be the opposite of what was desired, that is to say that courts in each country could feel free to apply their own 'national' interpretations irrespectively of the circumstances of the single case. It is much better to acknowledge that with respect to the specific issue the uniform law failed, at least for the time being, to bring about uniformity in the laws of the Contracting States, and to accept as the only possible remedy the recourse to the traditional conflict of laws approach. After all, by applying the interpretation prevailing within the State the law of which would govern the transaction in the absence of the uniform law, it may be hoped that the solution will be the same irrespective of the forum chosen by the parties".[429]

Bonell's alternative should be read with caution because it puts the rules of private international law back into the domain that CISG is trying to cover.

It is the present writer's opinion that any resort to private international law, either directly (*i.e.*, Article 7(2) CISG), or indirectly (*i.e.*, Bonell's alternative on divergent interpretations), should be avoided by anyone who believes that uniformity is a goal that is worth pursuing seriously. Should the resort to private international law receive further support and legitimacy, it is doubtful whether any domestic tribunal will approach CISG in the "a-national" frame of mind that it commands. In any case, the analogy used by Professor Bonell between CISG and the Geneva Uniform Law (1930) may not be entirely appropriate, since the latter – unlike the former – governs not only international transactions, but domestic ones as well. Conflicting interpretations under Conventions like the Geneva Uniform Law, pose greater difficulties than divergent interpretations of CISG, which is confined to international transactions.

The belief that careful consideration of foreign experience may be helpful has become widely diffused, not only in legal writings,[430] but also in judicial practice.

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[427] David (1971), *supra* note 41, at 103.
[428] *See* Bonell (1987), supra note 113, at 92-93; *see also* Van der Velden (1987), *supra* note 249.
[429] Bonell (1987), *supra* note 113, at 93. For a similar view and further references, Bonell cites J.Kropholler, *Internationales Einheitsrecht, Allgemeine Lehren* ((Tübingen, Mohr, 1975), at 204 *et seq*.
[430] *See* David (1971), *supra* note 41, at paragraph 294; Giles (1970), *supra* note 395, at 29.

There is an increasing number of references made by judges from one country to decisions of municipal courts of another Contracting State, with a view to avoiding "judicial diversification of uniform law".[431] Even in England there is a tendency to adapt traditional rules of construction of statutes to meet the particular ends of uniform law.[432]

Having examined the attitudes of different legal systems to foreign precedent and having noted the modern trends in that area, we must address another real problem that affects a municipal judge's efforts to cope with foreign decisions. The issue at hand is not one of access to foreign decisions – because UNCITRAL has taken many steps to ameliorate any practical difficulties relating to access, including the establishment of CLOUT, whereby the original texts of decisions and other materials may be obtained from the UNCITRAL Secretariat on payment of the cost of copying and mailing.[433] Of more concern is the issue of the ability of law students, practitioners and judges to understand foreign decisions. The unwillingness of some judges to consider foreign jurisprudence is often due to mistrust and an uneasy awareness of their lack of familiarity with foreign systems of law.[434] It has long been suggested that the common preference of judges for the law of their own country – a phenomenon known as *"chauvinisme judiciaire"*[435] – might be explained by a sincere recognition of their not having been trained to cope with foreign law.[436] The risk with respect to foreign decisions in the field of uniform law is that judges may find it easier to follow the interpretation of a uniform international law provision given by the courts of their own State, than that prevailing in another Contracting

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[431] This is the title of an Article by Mankiewicz in the *International and Comparative Law Quarterly*, (1972) 718.

[432] *See* the statements of Lord Denning in Buchanan v. Babco Forwarding & Shipping Ltd. [1976] 2 W.L.R. 107 at 112, of Lord McMillan in Stag Line v. Foscolo Mango & Co. [1932] A.C. 328, of Lord Diplock in The Hollandia [1983] A.C. 465 at 572, and of Roskill L.J. in Rothmans of Pall Mall v. Saudi Arabian Airlines Co. [1981] 1 Q.B. 368.

[433] The system for reporting and distribution of decisions is described in the UNCITRAL document, "Case Law on UNCITRAL Texts (CLOUT)", A/CN.9/SER.C/GUIDE/1 (19 May 1993). The UNCITRAL Secretariat can be reached at Vienna International Centre, PO Box 500, A-1400 Vienna, Austria: Fax (43 1) 237 485; Telex 135612 uno a; Tel 21131-4061. The sixth meeting of National Correspondents was held at UN Headquarters, NY, on 16 June 1994. *See also* G. Fisher, "UNCITRAL gives International Trade Law CLOUT", 21 *Australian Bus. L. Rev.* (1993) 362.

[434] For example, *see* the judgment of Lord Diplock in the Fothergill case [1980] 3 W.L.R. 209 at 225.

[435] Ariens, "Chauvinisme Judiciaire", *Nederlands Tijdschrift voor Internationaal Recht* (1962) 1.

[436] *See* M.Wolff, *Private International Law* (2nd edition, Oxford: 1950),at 17-18: "A conscientious judge will be glad if the rules of Private International Law allow him to apply the law of his own country ... Even if he knows the foreign language he is never sure that his interpretation of, say, a foreign code is correct and that all the essential statutes, decisions, and text-books are at his disposal. He is acting as a judge, but he knows no more and often less about the foreign law than first-year students in the country in question."

State.[437] Law schools should take on the task of education in this area. The difficulties associated with understanding foreign jurisprudence should not be exclusively attributable on actual differences between the rules of substantive law because there are not that many. Rather, it is mainly the different classifications and general notions of each legal system that make it unique. Universities should educate students to deal with foreign legal concepts and classifications, stressing more the operative side of these, rather than dramatising differences by expressing foreign legal rules through rigid conceptual tools.[438] As the modern lawyer needs to understand and deal with foreign precedent, the modern student (who may be the future judge) needs to be educated with an international perspective. Only then judges may be able to exorcise their suspicion of foreign decisions, which at times is quite outspoken and fallacious. One such instance of a judgment riddled with suspicion towards foreign case law was provided by Lord Diplock in the Fothergill case.[439] This example is indicative of the problem discussed above, not so much because of the stress Lord Diplock laid on the caution to be used when dealing with a foreign judgment, but because of his rather approximate representation of the French legal system.[440]

(b) Doctrine (scholarly writings; commentaries)

Another "antidote"[441] to the danger of divergent interpretations of CISG is the use of "doctrine", academic writings. The bibliography concerning the literature on CISG is voluminous.[442] The value of scholarly writings and international commentaries in the

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[437] For example, in the interpretation of Article 31 of the Geneva Convention on Bills of Exchange (1930), in cross-border cases, French courts chose to follow the French interpretation (Cass. Comm. 4 mars 1963, Hocke v. Schnubel, Note by B.Goldman in *Journal du droit international* (1964) 807), while German courts have followed a different path, applying choice of law rules, as if different interpretations of a uniform act were equal to different substantive norms (BGH 29 Oct. 1962: E. von Caemmerer, 2 *Internationale Rechtssprechung zum Genfer einheitliche Wechsel – und Scheckrecht*, (Tübingen, 1967)).

[438] For academic support on this point, *see* S.Ferreri, "The Influence of Education – in Law Schools and Law Faculties – on the Application of Uniform Law", *International Uniform Law in Practice – Acts and Proceedings of the 3rd Congress on Private Law held by UNIDROIT* (Rome, 7-10 September 1987), (Oceana Publications: 1988) 289-293.

[439] [1980] 3 W.L.R. 209.

[440] [1980] 3 W.L.R. 209, at 225, where it is said that the *Cour de Cassation* has binding authority over lower courts. This is not strictly true, as a decision of the *Cour de Cassation* has strong persuasive power but is not binding upon lower courts which may decide to ignore it altogether. For the operation of Article 5 of the French Code Civil, *see* the discussion of "Civil law jurisdictions and international precedent", *supra*; *see also* Solus & Perrot, *Droit judicaire prive* (Paris, 1961), vol. I, at 615.

[441] This expression is used by Honnold (1988), *supra* note 351, at 208.

[442] *See*, e.g., P.Winship, "The U.N. Sales Convention: A Bibliography of English-Language Publications", 28 *Int'l. Law.* (1994) 401. The Pace University website is also an excellent and updated source: www.cisg.law.pace.edu

promotion of an autonomous, international interpretation of CISG and its uniform application can not be overlooked.[443] Once again different legal systems, historically, have placed different importance on the role played by doctrine in the interpretation of legislation. In civil law countries, recourse to doctrine as an instrument of interpretation for domestic and foreign law has never been doubted.[444] On the other hand, common law jurisdictions have traditionally given little effect to scholarly writings. But even in common law countries, such as England and America, where judges traditionally have been reluctant to have recourse to scholarly writing, the need for uniformity in interpreting international Conventions has led to a more liberal approach and the use of doctrine has become increasingly common.[445] In the United States, academic writing is cited freely in judicial opinions, while there was similar reliance in England, in Fothergill v. Monarch Airlines Ltd.[446] In that case, at the House of Lords, the issue was an article of the Warsaw Convention on Carriage by Air. There, several foreign precedents were quoted, but their example was dismissed and the caution to be used when dealing with foreign judgment was stressed.[447] The result, which might seem paradoxical for a common law system, was that more weight was attached to foreign literature than to its caselaw.[448]

The sharpest divergence from traditional common law practice is reported in Canada, where courts long ago shed reluctance to use scholarly writing and regularly cite textbooks, law reviews and other scholarly literature. This development is explained "by the wide geographical dispersal of Canadian courts, a less cohesive bar, less specialisation among judges and the greater influence exercised by Canadian law schools".[449] It is interesting to note that some of the factors responsible for the Canadian development could also be true, structurally at least, in the context of CISG and its application world-wide.

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[443] *See* E.Bodenheimer, "Doctrine as a Source of the International Unification of Law", 34 *Am. J. Comp. L.* (Supplement) (1986) 67, where the author examines from a comparative point of view and in detail the question of "whether doctrinal writings may be considered primary authorities of law on par with legislation and (in some legal systems) court decisions, or whether they must be relegated to the status of secondary sources." *Ibid.*, at 71.

[444] *See* Honnold (1991), *supra* note 53, at 144.

[445] *Ibid.*

[446] [1980] 3 W.L.R. 209.

[447] Per Lord Diplock, [1980] 3 W.L.R. 209, at 225.

[448] *See* Mann (1983), *supra* note 343, at 384.

[449] *See* Honnold (1987), *supra* note 389, at 126, where he cites Ziegel, *Canadian National Report* (Sydney, 1986), at 004. 4(d).

It is the view of the present writer that in considering the interpretation given to CISG by foreign courts, all national courts should consider the doctrinal writings that influenced such interpretation in those foreign courts. This practice gains its legitimacy by the recognition of the vital role that doctrine can have in avoiding interpretative diversity in CISG. This is achieved due to the introduction, through the use of doctrine, of international, rather than domestic, lenses to view CISG.

(c) *Travaux preparatoires* (legislative history)

Another useful guide for resolving doubts about the exact meaning, scope and effect of CISG's provisions is the legislative history of CISG. The study of the *travaux preparatoires* – which include not only the acts and proceedings of the Vienna Conference, but also the summary records of the previous deliberations within UNCITRAL – and the use of such material is generally advocated by most commentators.[450] The relationship between the old and the new law can often be found in the "*travaux preparatoires*". However, the same commentators have also stressed that the value of the legislative history should not be overestimated.[451] There are a few reasons for this caution.

First of all, it should not be forgotten that CISG, once adopted by the Contracting States, "has a life of its own"[452] and its meaning can change with time and use. So, it becomes apparent that the original intention of the drafters, documented in the *travaux preparatoires*, is only one of the elements to be taken into account for the purpose of CISG's current interpretation.

It should also be borne in mind that not all countries' rules on the interpretation of treaties are the same. In civil law countries, courts often resolve legislative problems of interpretation by referring to the legislative history of the particular legislation.[453] In contrast, courts in common law countries, traditionally, have not accepted the legitimacy of legislative history so readily, sticking to narrow traditions of literal interpretation.[454] More recently, however, resort to *travaux preparatoires* has been

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[450] *See* Honnold (1991), *supra* note 53, at 136 *et. seq.*; Bonell (1987), *supra* note 113, at 90. Among civil law commentators, it is widely accepted that the legislative history of the uniform law must be taken into account when interpreting the uniform law; *see, e.g.*, B.Audit (1990), *supra* note 329, at 48; F.Enderlein, D.Maskow, H.Strohbach, *Internationales Kaufrecht* [International sales law - *in German*], (Haufe: Berlin, 1991) 61.

[451] *See* David (1971), *supra* note 41, at 105; Honnold (1991), *supra* note 53, at 141-142; Bonell (1987), *supra* note 113, at 90.

[452] Bonell (1987), *supra* note 113, at 90.

[453] *See* Honnold (1987), supra note 389, at 133.

[454] *See* Honnold (1991), *supra* note 53, at 138. However, the English position is not as rigid as it used to be, *see* Fothergill v. Monarch Airlines [1980] 3 W.L.R. 209.

permitted in certain cases.[455] This is a welcome development because an international uniform law, being the product of an international uniformity process, may not be treated just like any other domestic law enacted by an adopting State. The House of Lords first recognised that restrictive canons of statutory interpretation ought not to be brought to bear upon an international uniform text, in Fothergill v. Monarch Airlines. In that case, the House of Lords was unanimous in holding that the legislative history of the Warsaw Convention should be examined for assistance in interpreting the word "*avarie*" (or "damage").[456]

Another reason for a cautious treatment of the legislative history of CISG is that the *travaux preparatoires* sometimes reveal a difference of opinion among the drafters themselves. Also, even when the arguments put forward in favour of the adoption of a given provision were not controversial, they are not always, or necessarily, decisive for the final product. At other instances, the difference in opinion documented is of a political rather than legal nature. It should always be kept in mind that the provisions of CISG were adopted in a diplomatic conference.

(d) Other Proposals

(i) International Tribunal

Other proposed methods to counter divergence in the interpretation of CISG and to ensure that any tendencies towards divergence shall be corrected, include the establishment of an international tribunal with ultimate jurisdiction – similar to the International Court of Justice – to make preliminary rulings on questions arising out of the interpretation of the provisions of CISG.[457] In one version of such a possible arrangement, it has been suggested that during the sittings of the international tribunal, national courts be required to suspend their decisions until after the judgement of this tribunal and then decide in accordance with that judgement.[458] A similar procedure already exists within the framework of the European Community. Under that scheme, the European Court of Justice has been given the competence to act at the request of national courts of the European Member States on questions relating to the interpretation of European Community Law[459] and other international

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[455] Pepper v. Hart [1993] AC 593.
[456] [1980] 2 All ER 696.
[457] For the proposal to establish an international court, *see* Graveson (1968), *supra* note 51, at 12; *see also* Bonell (1987), *supra* note 113, at 88.
[458] *See* Bonell (1987), *supra* note 113, at 88-89.
[459] *See* Article 177 of the Treaty of Rome setting up the European Economic Community.

Conventions concluded between the Member States,[460] and to deliver binding decisions on such questions.

However, the main hindrance to the conception of a similar solution with respect to CISG has to do with the special nature and origins of the Convention itself. The theoretical and practical difficulties that arise in a discussion of the establishment of a world court to deal with matters of CISG can be attributed to the following factors:

(a) Geographical distance between the Contracting States

Like other international Conventions elaborated under the auspices of the United Nations, CISG is not restricted to a particular regional area, but is intended to receive world-wide acceptance. This factor can create problems regarding the choice for the tribunal's sittings, a decision that can have a negative psychological impact on certain geographically remote Contracting States, as well as being excessively time consuming and financially taxing on them.

(b) Social, political, economical, legal and cultural differences among the Contracting States

It has been observed that to expect all Contracting States – incorporating a huge cultural diversity of social, political, economical and legal structures – to agree on conferring upon an international tribunal the exclusive competence to resolve divergences between the national jurisdiction on the interpretation of the uniform international trade law, would be "entirely unrealistic".[461]

(c) Diversity of commercial disputes resolution

Since disputes arising in connection with international sale contracts are frequently referred to arbitration for settlement, there exists the problem of ensuring that private arbitrators, when faced with a question of CISG's interpretation, would submit the case to such a hypothetical international tribunal.

(d) Financial-logistical support for such an expensive operation

The creation of such a hypothetical international tribunal and the establishment of the necessary supporting infrastructure (human and financial resources) require complex and expensive arrangements within UNCITRAL, as well as high costs to litigants in money and delay.

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[460] *E.g.*, such as the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (1968); *see* the 1971 Protocol by the European Court, on the Interpretation of the 1968 Convention.

[461] The expression belongs to Bonell (1987), *supra* note 113, at 89.

Although the model of an International Court of Justice has worked with issues of public international law, it is extremely unlikely that it could also work with private international law themes, such as CISG, for the reasons highlighted above.

(ii) Advisory Body

A modified and less ambitious proposal is to entrust an international organ,

> "... whether a court or a particularly qualified international organisation, with the limited task of rendering advisory opinions concerning the proper interpretation to be given to the Convention."[462]

One innovation contained in this proposal, when compared to the previous one, is that while it is up to the judge, or the arbitrator, or the parties themselves to instigate the proceedings in the international tribunal, this organ's consultative role would not be limited to disputes that have already arisen.

Under the second proposal, the tribunal would also operate in a general and abstract context. For instance, national authorities, desiring to ensure a correct application of CISG within their State, could request from the tribunal clarification on a particular CISG provision.[463] Precedents for such a procedure exist and at the eighteenth session of UNCITRAL, the Secretariat submitted a note discussing the possibility of establishing a similar procedure for current UNCITRAL legal texts.[464]

However, the number of objections that can be raised even against such a proposal is again high, and the substance of these objections still serious.[465] These objections regard:

(a) The proper authorisation of the tribunal

The biggest problem relates to the proper source of authorisation for UNCITRAL to give its opinion on an instrument which has been adopted in final form not by the Commission itself, but by a diplomatic conference to which all Member States of the United Nations have been invited.

(b) The structural organisation of such a body

There are many questions as to whether the decisions would be rendered by UNCITRAL as a whole at its annual sessions, or whether a permanent committee,

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[462] *See* Bonell, *ibid.*, at 89-90.

[463] *See*, *e.g.*, the work done by the International Labour Office, the Council of the International Civil Aviation Organisation and the Central Office for International Road Transport, in carrying out advisory functions with respect to the application of the uniform laws elaborated under their auspices.

[464] *See* A/CN.9/287 of 21 February 1985.

[465] *See* Bonell (1987), *supra* note 113, at 90, who poses the questions arising out of such a scheme without, though, providing any answers to these questions.

composed of a restricted number of UNCITRAL members, should be set up for this purpose.

(c) The legitimacy of the body's consultative function

The main issue here is whether it would be appropriate to entrust with such an important and politically controversial task an organ composed of representatives of States.

In comparison with the prior proposal involving an international tribunal, the advisory body option seems more feasible, although still riddled with very difficult and complex issues of legal and political nature.

7. CONCLUSIONS

The legislative history of Article 7(1) CISG was examined in this chapter. It provided an insightful look at the provision's drafting and revealed some of the compromises made in producing its text.

The present writer argued that the creation and adoption of CISG are only the preliminary steps towards uniformity in international sales law. It is the interpretation – and the uniform application – of the uniform law that will complete the process, and it is at these latter stages that the success, or failure, of the unifying effort can be judged. This chapter analysed the main issues that arise in relation to Article 7(1) CISG – CISG's international character, the need to promote uniformity in CISG's application and the observance of good faith in international trade – in order to help understand the structure, scope and function of the article.

The present writer also argued that an autonomous interpretation of CISG is not simply a consequence of the international characterisation of CISG but that it is also necessary for uniformity in CISG's application to be achieved. This is so because in CISG the elements of "internationality" and "uniformity" are not only inter-related, but inter-dependent as well. It was further argued that, in interpreting CISG, the rules and techniques traditionally followed in interpreting ordinary domestic legislation should be avoided and that Article 7 CISG represents an implied provision in the body of the law for the undertaking of a liberal approach to the Convention's interpretation.

It is part of the present writer's thesis that the ultimate aim of CISG, to achieve the broadest degree of uniformity in the law for international sale transactions, can not

be achieved if national principles, or concepts, taken from the law of the forum, or from the law which in the absence of the Convention would have been applicable according to the rules of private international law, are allowed to be used in the interpretation of CISG. The "nationalisation" of the uniform rules would deprive the instrument of its unifying effect.

The concept of good faith and its scope and function in different legal systems was discussed in the previous chapter. However, some issues concerning the final inclusion of the principle of good faith in CISG were explored in this chapter, in order to determine the nature, scope and meaning of the concept in the application and interpretation of CISG. The division in the scholarly opinion – whether to endorse the literal meaning of the provision and conclude that the principle of good faith is vague and nothing more than a tool of interpretation, or to adopt a broader interpretation of good faith, stating that the duty to observe good faith is also directed to the conduct of the parties – was examined. The present writer argued that the broad, liberal approach is preferable, with the important qualification that the principle should not be stretched to impose on the parties additional obligations of a positive character.

Different interpretative aids – ranging from the use of case law, *travaux preparatoires* and doctrine, to the establishment of institutional structures – that may assist in the maintenance of the uniform application of CISG and act as a hindrance to the development of divergent interpretations were also discussed in this chapter. It was argued that as a matter of principle, common sense and effectiveness, courts should at least consider the jurisprudence developed by foreign courts applying CISG. Such deference would require certain concessions to be made in legal techique and attitude by both common and civil law jurisdictions and the establishment of a relaxed system of precedent, whereas resorting to private international law should be avoided. Recent developments in the case law have provided some optimism that the activity around CISG is focused towards the right direction.

CHAPTER 4

ARTICLE 7(2) OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 1980

ARTICLE 7(2) OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

1. INTRODUCTION

Article 7 CISG

(1) ...

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

CISG represents an attempt to provide a uniform body of law applicable to international sale transactions. However, it does not constitute an exhaustive body of rules, and thus does not provide solutions for all the problems that can originate from an international sale transaction. Indeed, the issues governed by the 1980 Uniform Sales Law are limited to the formation of the contract and the rights and obligations of the parties resulting from such a contract.[466] This limitation gives rise to problems relating to the necessity of filling gaps in which any type of incomplete body of rules will result. It is to comply with such necessity that Article 7(2) CISG, designating the rules for filling any gaps in CISG, was drafted. The justification for such a provision lies in the fact that "it is hardly possible for an international group to draft a voluminous and complicated piece of legislation without leaving gaps behind,"[467] especially in the field of contract, as contracts have infinite variety. The aim of this provision is not very different from that which the interpretation rules found in Article 7(1) are pursuing, *i.e.*, uniformity in CISG's interpretation and application.

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[466] *See* Article 4 CISG: "This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:
(a) the validity of the contract or of any of its provisions or of any usage;
(b) the effect which the contract may have on the property in the goods sold."
For further exclusions to the applicability of CISG, *see* Article 2 (sale of certain goods), Article 3 (supply and manufacture contracts and labour contracts) and Article 5 (liability for death or personal injury). Also, the Convention is concerned neither with the possibility of obtaining judgments for specific performance where this remedy is not available under domestic law of the country hearing the dispute (Article 28), nor with the formalities required for the payment of the price (Article 54). In addition, the Convention does not govern rights based on fraud or agency law, *see* Honnold (1991), *supra* note 53, at 114-116.

[467] Eorsi (1984), *supra* note 221, at 2-11.

Article 7(2) CISG and gap-filling are directly connected to Article 7(1) CISG and interpretation, not only due to the proximity of their location in the text but, more importantly, because of their substantive relationship with each other.[468] Gaps in the law constitute a danger to the uniformity and autonomy of CISG's interpretation, because "one way to follow the homeward trend is to find gaps in the law."[469] Further, interpretation must be the means whereby gaps in CISG are filled, because when a gap is detected the problem arising thereby should be solved by way of interpretation of CISG. In accordance with the basic criteria established in Article 7(1) CISG and discussed in the previous chapter of the current work, uniformity in CISG's application is the ultimate goal. It follows that for the interpretation of CISG in general – not only in the case of ambiguities or obscurities in the text, but also in the case of gaps – "courts should to the largest possible extent refrain from resorting to the different domestic laws and try to find a solution within the Convention itself."[470]

This chapter examines the functional elements of Article 7(2) CISG. This is done by tracing the legislative background and the drafting compromises that led to the wording of the provision, in order to reveal the true character of the provision. Its potential to undertake a dominant and expanded role in the interpretation of CISG as a uniform international code is noted and supported through a discussion of gap-filling methodology. It will be argued in this chapter that this gap-filling provision of CISG not only has a vital role in promoting the uniformity and internationality of CISG, but also that it contains a potential bomb for the foundations of international uniform sales law, in its reference to the use of private international law rules. It is part of the present writer's thesis that this reference in Article 7(2) CISG, which was the result of another diplomatic drafting compromise between delegates at the Vienna Conference, should remain a dead letter, because any resort to the rules of private international law would not only represent regression into the uncertainty of choice of law rules and the escalation of transactional costs for litigants, but it would also spell the end of the practical value of CISG as a uniform code.

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[468] The line between implied terms and interpretation is a difficult one to draw – indeed it is not clearly drawn in some jurisdictions – which supports the present writer's view of the connection between Articles 7(1) and 7(2) CISG. *See* C Itoh & Co Ltd v. Cia de Navegacao Lloyd Brasilieiro (17 July 1998, Clarke J), affirmed by the English Court of Appeal at [1999] 1 Lloyd's Rep 115 (use of the officious bystander test when interpreting a contract).

[469] Eorsi (1984), *supra* note 221, at 2-9.

[470] Bonell (1987), *supra* note 113, at 75.

2. LEGISLATIVE HISTORY OF ARTICLE 7(2) CISG

As has been discussed in the previous chapter of this work,[471] the predecessor to CISG, ULIS, contained two provisions addressed to the problem of its interpretation. The first provision stated:

> "Rules of private international law shall be excluded for the purpose of the application of the present Law, subject to any provision to the contrary in the said Law." (Article 2 ULIS)

The second provision made a special reference to the problem of gap-filling:

> "Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which the present Law is based." (Article 17 ULIS)

When these two provisions are read together, one realises the strong indication that ULIS was "intended to constitute a self-contained law of sales, to be construed and applied autonomously, i.e., without any reference to or interference from the different national laws."[472] This approach of independence and self-sufficiency strengthens the position of the uniform law as an international instrument that should be interpreted and applied in a uniform manner. As has been correctly pointed out,

> "... if courts were permitted to turn to their domestic law, this would preclude the application of the uniform law in many cases that the drafters and the parties themselves had wanted to be covered by the uniform law."[473]

A further argument in favour of a gap-filling provision excluding the use of the rules of private international law (*i.e.*, in terms similar to those in Article 17 ULIS), is that reversion to national laws would involve

> "a great amount of uncertainty because the relevant rules of private international law for the determination of which national law should be applied in each case are neither clear nor uniform."[474]

However, it was strongly argued, in UNCITRAL, that the uniform law could not be considered as totally separated from the various national laws – as the uniform law did not deal with a number of important questions related to contracts of sale – and that it would be unrealistic and impractical to construe many undefined terms

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[471] *See* Chapter 3 in this thesis, *supra*, which deals with Article 7(1). Note that Professor Honnold prepared a Documentary History that reproduces the relevant documents and provides references to the repeated renumbering of the articles making it easier to trace the legislative history and development of CISG's; *see* Honnold (1989), *supra* note 89.
[472] Bonell (1987), *supra* note 113, at 66.
[473] Bonell, *ibid.*
[474] Bonell, *ibid.*

contained in CISG without having recourse to national law.[475] At the first session of the Working Group, in 1970, several proposals were submitted for the revision of Article 17 ULIS.[476] Amongst the different suggestions put forward was to delete the provision in its entirety, or to modify it so that it stated expressly that "private international law shall apply to questions governed but not settled by ULIS". None of the proposed suggestions was supported by a majority of the Working Group.[477] At the request of the Commission, which at its third session, in 1970, was equally unable to reach an agreement,[478] the Working Group discussed the matter again at its second session, in 1971, and on that occasion it decided to recommend the adoption of the following new version of Article 17:

> "In interpreting and applying the provisions of this Law, regard shall be had to its international character and to the need to promote uniformity in its interpretation and application."

The report of the Working Group stated that the proposed revision would clearly express two considerations not mentioned in the original Article 17:

(i) the international character of the law, and

(ii) the need for its uniform interpretation and application.

It was added, by the Working Group, that the omission of the reference to "the general principles on which the present Law is based" from the original text was due to the fact that such a reference was considered to be too vague.[479] Article 7(1) CISG was slowly taking shape during this process of revising Article 17 ULIS, while the reference to the "general principles" of the uniform law was to find a way back into CISG in what, eventually, was to become Article 7(2) CISG. At its fourth session, in 1971, the Commission approved the new provision as proposed by the Working Group. At the same time it was suggested that the provision be supplemented by an additional paragraph dealing with gaps in the uniform law. Opinions were equally divided between those who insisted on a "general principles" solution along the lines of Article 17 ULIS and those who, on the contrary, favoured the approach according to which possible gaps in the uniform law should be filled in by the domestic law indicated by the rules of private international law.

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[475] *See* Yearbook, I (1968-1970), 170; Yearbook, II (1971), 49.
[476] For a more detailed discussion of the proposals put forward at the first session of the Working Group regarding Article 17 of ULIS *see* Chapter 3 of the current work, *supra*, which deals with Article 7(1) of CISG.
[477] *See* Yearbook, I (1968-1970), 181-183.
[478] *See* Yearbook, I (1968-1970), 136.

The Commission decided not to take any final decision on this matter and to refer it to the Working Group for its consideration at an appropriate time.[480] At subsequent sessions devoted to the revision of ULIS, the Working Group did not discuss the matter further. Subsequent sessions dealt with the revision of the Uniform Law on Formation of Contracts and with the eventual insertion of the notion of "good faith in international trade" in what was, by now, Article 6 of the new consolidated UNCITRAL Draft Convention:[481]

> "In the interpretation and application of this Convention regard is to be had to its international character and to the need to promote uniformity and the observance of good faith in international trade."

During the discussion of Article 6 of the UNCITRAL Draft Convention that took place at the Vienna Conference, there were two types of amendments submitted. The first type was of a drafting nature and led to some changes in the wording of the article that today is known as Article 7(1) CISG. The second type of amendments was of a substantive nature and greater importance, since it led to the addition of a new paragraph to the provision dealing with gap-filling in CISG.

The substantive amendments proposed for the gap-filling mechanism of CISG can be divided into two different groups. In the first group belong amendments which proposed that gaps in CISG should be filled according to a certain set of legal rules already in existence. Examples of this type are provided by Bulgaria's proposal that gaps should always be filled in conformity with "the law of the seller's place of business"[482] and by Czechoslovakia's proposal that "the law applicable by nature of the rules of private international law"[483] should determine unsettled matters. However, there was also a different type of solution offered, one that called for the utilisation of the "general principles" of the Convention as a primary mode of filling any gaps in CISG. Such was the amendment proposed by Italy,[484] which read as follows:

> "Questions concerning matters governed by this Convention which are not expressly settled therein shall be settled in conformity with the general

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[479] *See* Yearbook, II (1971), 62.
[480] *See* Yearbook, II (1971), 72.
[481] *See* Yearbook, IX (1978), 14 et seq. This process is discussed in the previous chapter of this work since it deals with what eventually came to be known as Article 7(1) of the Vienna Convention.
[482] *See* the amendment of Bulgaria: A/Conf.97/C.1/L.16.
[483] *See* the amendment of Czechoslavakia: A/Conf.98/C.1/L.15.
[484] *See* the amendment of Italy: A/Conf.97/C.1/L.59.

> principles on which this Convention is based or, in the absence of such principles, by taking account of the national law of each of the parties."

For a variety of reasons, none of the proposed amendments gained sufficient support. Bulgaria's proposal was resisted on the basis that it was biased in favour of one of the parties to the transaction – the seller – too much, because

> "... even if one intended to accept its underlying idea according to which gaps in the Convention should always be filled on the basis of domestic law, it was not advisable to refer in every single case for this purpose to the law of the seller's place of business."[485]

As to the Italian amendment, it failed to convince the delegates because its reference to "the national law of each of the parties" was thought to be unclear and unable to cope with a situation where the national laws of the parties provided irreconcilable solutions on a particular issue of dispute.[486]

The solution was given in the form of a compromise, by combining the two groups of amendments. The first part of the Italian proposal was kept, but its troublesome last part was replaced with the Czechoslovakian proposal. The resulting paragraph was added as a second paragraph to Article 6 of the UNCITRAL Draft Convention – thus creating what is now Article 7(2) CISG:

> "Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law."

Although some delegations opposed the addition of this new paragraph to the uniform law and maintained their preference for the original text of Article 6 of the UNCITRAL Draft Convention, the compromise proposal was adopted on a count of 17 votes, in favour, to 14 votes, against, with 11 abstentions.[487]

The compromise that is Article 7 CISG makes clear the following:

(i) for the purposes of interpretation of the Convention in general, "regard is to be had to its international character and the need for uniformity in its application",[488]

(ii) questions arising in connection with an international contract of sale and falling within the scope of CISG, but not specifically regulated by any of its

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[485] Bonell (1987), *supra* note 113, at 70.
[486] *See* Official Records, II, 255-256.
[487] *See* Official Records, II, 257.
[488] Article 7(1) CISG.

provisions, are to be filled, where possible, by applying the "general principles on which it is based",[489]

(iii) only in the absence of such "general principles" is recourse to be had to solutions provided by the domestic law applicable by virtue of the rules of private international law.[490]

It is evident from the above observations that courts, or other tribunals, interpreting CISG should, to the "largest possible extent",[491] refrain from resorting to domestic laws and try to find a solution within CISG itself.

Although Article 7(2) CISG represents a drafting compromise, it is a compromise more favourable to the supporters of Article 17 ULIS, than to its opponents. As it has been noted earlier, CISG represents an attempt to codify the law on international sale of goods contracts and it was intended to replace existing domestic statutes and case law. It was not meant to be complementary to national laws but, rather, it was intended to be an exhaustive regulation.[492] If the compromise struck to draft Article 7(2) CISG had instead favoured the approach proposed by the opponents of Article 17 ULIS, effectively making recourse to domestic law more readily available, CISG's goal of uniformity would have been severely undermined.[493] Under different domestic laws, deemed to apply according to the rules of private international law, the parties to a contract would have been faced with the uncertainty that accompanies such a determination.[494]

In the manner that Article 7(2) CISG is drafted, the risk of diversity in the Convention's gap-filling from one jurisdiction to another is minimised, since recourse to domestic laws is to be had only when it is not possible to fill a gap by applying the general principles on which the Convention is based. In the opinion of the present writer, it should be a rare, or non-existent, case where there are no relevant general principles to which a court might have recourse under Art. 7(2) CISG. In this chapter, the present writer will argue for an expanded definition of "the general principles" on which CISG is based that includes the UNIDROIT Principles,

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[489] Article 7(2) CISG.
[490] Article 7(2) CISG.
[491] Bonell (1987), *supra* note 113, at 75.
[492] *See* Bonell (1987), *supra* note 113, at 78; Eorsi (1984), *supra* note 221, at 2-6; Schlechtriem (1986), *supra* note 359, at 57; Honnold (1991), *supra* note 53, at 60.
[493] For a similar opinion, *see* Honnold (1991), *supra* note 53, at 157. *See also* M.N.Rosenberg, "The Vienna Convention: Uniformity in Interpretation for Gap-Filling - An Analysis and Application", 20 *Australian Bus. L. Rev.* (1992) 442, at 450.
[494] *See* Bonell (1987), *supra* note 113, at 9; Honnold (1991), *supra* note 53, at 150.

which because of their general character may be applied on a much wider scale, so that there will not be a need to have recourse to conflict of laws rules.

3. ARTICLE 7(2) CISG AND GAP-FILLING METHODOLOGY

(a) Gaps "*praeter legem*"

Before the gap-filling rule in Article 7(2) CISG can be put into operation, the matters to which the rule applies must first be identified.

The starting point of the gap-filling analysis is the observation that the gaps to which the rule refers are not the gaps *"intra legem"*, *i.e.*, the matters that are excluded from the scope or the application of CISG – such as the matters discussed in Articles 2,[495] 3,[496] 4[497] and 5[498] of CISG – but the gaps *"praeter legem"*,[499] *i.e.*, issues to which CISG applies but which it does not expressly resolve.

Professor Bonell is of the same opinion, as he has stated that the "first condition" for the existence of a gap, in the sense of Article 7(2) CISG, is that the issue concerns matters "governed by the Convention", and that issues which are not within the scope of the Convention "have been deliberately left to the competence of the non-unified national laws".[500] It is has also been correctly stated that the absence of a uniform law provision dealing with such issues cannot be regarded as a gap, "but is a logical consequence of that preliminary decision"[501] to be left outside the scope of CISG's domain.

(b) Gap-filling methodology

In general gap-filling methodology, three different approaches exist to fill the gaps "*praeter legem*". The first approach is based on the application of the general

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[495] Stating that CISG does not apply to consumer sales, to auctions or to sales of shares, vessels and electricity.

[496] Excluding the application of the Convention in cases of "supply and manufacture" contracts and labour contracts.

[497] Setting out the scope of the Convention and excluding from it the issue of validity of the contract and the effect of the contract on the property in the goods.

[498] Excluding from the scope of the Convention the issue of the liability of the seller for death or personal injury caused by the goods to any person.

[499] The terms "*intra legem*" and "*praeter legem*" are used by Ferrari (1994), *supra* note 39, at 217. For the distinction between gaps "*intra legem*" and gaps "*praeter legem*", Ferrari, *ibid.*, at note 186, refers to H.Deschenaux, "Der Einleitungstitel", in Max Gutzwiller *et al.* eds., 2 *Schweizerisches Privatrecht* (1967) 95.

[500] Bonell (1987), *supra* note 113, at 75.

[501] Bonell, *ibid.*

principles of CISG and is known as the "true Code approach".[502] According to the "true Code approach", a court, when faced with a gap in a Code, should only look at the Code itself, including the purposes of the Code and the policies underlying the Code, but no further. It follows that, for the solution of questions governed by a Code, the answer can be found within the framework of that Code. The justification of this approach lies in the belief that a "true Code" is comprehensive and, as such,

> "... it is sufficiently inclusive and independent to enable it to be administered in accordance with its own basic policies".[503]

In effect, the Code is approached as a source of law itself.

The second approach relies on the use of external legal principles to fill gaps found in the Code and is known as the "meta-Code approach".[504] This approach is based on the idea that external legal principles should supplement the provisions of a Code, unless this is expressly disallowed by that Code.[505]

The third approach to gap-filling is a combination of the foregoing approaches.[506] According to this approach, one is supposed to first apply the general principles of CISG. However, in the absence of any such principles, one should then resort to the rules of private international law.

The drafters of the 1964 Hague Conventions chose the first approach.[507] Article 2 of ULIS excludes the application of rules of private international law, except in a few

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[502] *See* W.D.Hawkland, "Uniform Commercial 'Code' Methodology", *U. Ill. L. F.* (1962) 291, 292. Ferrari (1994), *supra* note 39, at 218, fn.189, states that the "true code approach" corresponds to what Kritzer calls the "internal analogy approach", in Kritzer (1989), *supra* note 394, at 117.

[503] Hawkland (1962), *supra* note 502, at 292. This approach had been discussed during the 1951 Hague Conference (January 1-10). For a discussion of the 1951 Conference, *see* Rabel (1952), *supra* note 82, at 58. Rabel said about this gap-filling approach: "... within its concerns ... the text must be self-sufficient. Where a case is not expressly covered the text is not to be supplemented by the national laws – which would at once destroy unity – but be construed according to principles consonant with its spirit": Rabel, *ibid.*, at 60.

[504] For this expression, *see* S.H.Nickles, "Problems of Sources of Law Relationships under the Uniform Commercial Code - Part I: The Methodological Problem and the Civil Law Approach", 31 *Ark. L. Rev.* (1977) 1.

[505] *E.g.*, *see* the U.C.C. § 1-103, which states that "that unless displaced by the particular provisions of the Act, the principles of law and equity ... shall supplement its provisions." This approach seems to be favoured in common law, *see* Dore & De Franco (1982), *supra* note 86, at 63.
Talking about the U.C.C., however, note the tension that is created within the U.C.C. due to the wording of § 1-102(1), which states that "this Act shall be liberally construed and applied to promote its underlying purposes and policies"; an approach more closely associated with civil law, *See* M.Franklin, "On the Legal Method of the Uniform Commercial Code", 16 *Law & Contemporary Problems* (1951) 330, at 333.

[506] For further references to the three approaches, *see* Kritzer (1989), *supra* note 394, at 117.

[507] *See* Articles 2 and 17 of the 1964 Uniform Law on International Sale of Goods. *See*, for example, Wahl, "Article 17", in *Kommentar Zum Einheitlichen Kaufrecht* (H.Dolle ed., 1976) at 126, where the commentator, after having listed the three different approaches to filling gaps *praeter legem*, states that "ULIS has adopted the first method. The text of Article 17, its legislative history as well as the

instances[508] and Article 17 of ULIS provides that the general principles underlying the 1964 Uniform Law are to be used to fill any gaps. It has been correctly concluded that

> "[t]his has the intended negative implication that courts may not refer to the domestic law of the country whose law would otherwise apply under the rules of private international law."[509]

However, ULIS's pursuit of absolute independence from domestic law failed the test of acceptance. The solution adopted in ULIS has been criticised and has been considered by some commentators as one of the reasons for its failure to win wide acceptance.[510]

For CISG a solution different from the criticised one, which had been adopted in ULIS, was endorsed. It is an approach that combines recourse to general principles with an eventual recourse to the rules of private international law. When a matter is governed by CISG but is not expressly settled in it, Article 7(2) CISG offers a solution by:

(i) internal analogy, where CISG's other provisions contain an applicable general principle; or

(ii) reference to external legal principles (the rules of private international law) when CISG does not contain an applicable general principle.[511]

The recourse to general principles in filling gaps constitutes a method well-known in civil law systems. In has been observed that the approach endorsed for the settlement of questions in conformity with the general principles of the Convention, in Article 7(2) CISG, "reflects the approach established for civil law codes".[512] Bonell sheds some more light into the nature of this approach when he notes that even

> "in countries such as France or the Federal Republic of Germany, where the approach is not formally imposed by statute, it is taken for granted that a Code or any other legislation of a more general character must be considered as more that the mere sum of its individual provisions. In fact, it must be

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provision contemplated in Article 2 show that the application of the rules of international private law had to be limited."

[508] This view is widely accepted and not disputed. *See*, *e.g.*, H.J.Berman, "The Uniform Law on International Sale of Goods: A Constructive Critique", 30 *Law & Contemp. Probs.* (1965) 354, at 359.

[509] P.Winship, "Private International Law and the U.N. Sales Convention", 21 *Cornell Int'l. L. J.* (1988) 487, at 492.

[510] *See*, *e.g.*, Dore & Defranco (1982), *supra* note 86, at 63.

[511] For a similar appraisal of the Vienna Convention's gap-filling measures, *see* Kritzer (1989), *supra* note 394, at 117.

[512] Honnold (1991), *supra* note 53, at 149. Ferrari (1994), *supra* note 39, at 220, cites Article 7 of the Austrian Civil Code, Article 1(2) of the Egypt Civil Code, Article 6(2) of the Spanish Civil Code; all being examples of the same approach adopted in civil law codes.

> interpreted and, if necessary, supplemented on the basis of the general principles which underlie its specific provisions."[513]

Although the notion of general principles also exists in common law, it is quite different from that in civil law since it derives from different sources[514] and has a different function. Commenting on the origin and function of general principles, Bonell has stated that, in common law,

> "statutory law is seen as only fixing rules for defined situations, not as a possible source of general principles. As such, not only are the statutes traditionally interpreted in a very strict sense, but if there is no provision specifically regulating the case at hand, the gap will immediately be filled by principles and rules of the judge-made law."[515]

(c) Article 7(2) CISG and gap-filling

The approach to gap-filling adopted in Article 7(2) CISG is influenced by similar solutions to gap-filling that can be found in the codes of continental Europe.[516] Any gaps must be filled, whenever possible, within the Convention itself; a solution that complies with the aim of Article 7(1) CISG, *i.e.*, the promotion of the Convention's uniform application.[517] As has been noted above, there are various types of logical reasoning that can be employed in order to find a solution to a gap within CISG itself, and recourse to CISG's general principles constitutes only one method of gap-filling. This observation leads to a further interpretation issue, the interpretation of Article 7(2) CISG itself. One must determine whether Article 7(2) CISG should be

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[513] Bonell (1987), *supra* note 113, at 77, where the author cites K.Zweigert & H.Kotz, *Einfuhrung in die Rechtsvergleichung auf dem Gebiete des Privatrechts* (Mohr, Tübingen, 2nd ed., 1982), I at 103 *et seq*.

[514] The source of general principles in civil law is legislation, whereas in common law the source is case law. *See* O.Kahn-Freund, "Common law and Civil Law - Imaginary and Real Obstacles to Assimilation", in M.Cappelletti (ed.), *New Perspectives for a Common Law of Europe* (Florence, 1978) 154. *See also* N.Brown, "General Principles of law and the English Legal System", in M.Cappelletti (ed.), *New Perspectives for a Common Law of Europe* (1978) 174.

[515] Bonell (1987), *supra* note 113, at 77-78. Note, however, that this statement does not quite address the type of statutory provision typified by s. 62(2) Sale of Goods Act 1979 (U.K.), which allows general rules of common law and equity – outside the statute but within the same legal order – to apply to contracts for the sale of goods as far as they are not inconsistent with the provisions of that Act. A similar provision can be found in the Uniform Commercial Code, the comprehensive statute which aims at codifying existing American law on commercial transactions: § 1-103 expressly provides that "unless displaced by the particular provisions of this Act, the principles of [common] law and equity, including the law merchant ... shall supplement its provisions."

[516] *See* Bonell, *ibid*., at 78, where the author states that it could not have been otherwise, as the Convention "represents a veritable codification of the law of international sales contracts, intended to replace ... the existing domestic laws, whether they are embodied in statutes or developed by case law."

[517] See Enderlein & Maskow (1992), *supra* note 331, at 58, where the authors state that Article 7(2) indicates that gaps must be "closed...from within the Convention. This is in line with the aspiration to unify the law which ... is established in the Convention itself."

interpreted broadly, *i.e.*, whether it includes other methods of legal reasoning as well, such as analogical application,[518] or whether it is to be interpreted restrictively.

It is the view of the present writer that Article 7(2) CISG must be interpreted broadly and that there are two complementary methods of gap-filling allowed under this provision (with a fine distinction within the latter method – between principles extrapolated from within specific CISG provisions and general principles of international commercial law on which CISG as a whole is founded[519] – to be expounded later):

(a) an analogical application of specific provisions of CISG, and

(b) a consideration of the general principles underlying CISG as a whole, when the gap can not be filled by analogical application of specific provisions.

The difference between the two gap-filling methods is explained well by Professor Bonell as follows:

> "Recourse to 'general principles' as a means of gap-filling differs from reasoning by analogy insofar as it constitutes an attempt to find a solution for the case at hand not by mere extension of specific provisions dealing with analogous cases, but on the basis of principles and rules which because of their general character may be applied on a much wider scale."[520]

Analogical application has also been accepted as a method of gap-filling by many other scholars in this area. An explanation of this method is provided by Enderlein and Maskow, who, in endorsing a broad interpretation of Article 7(2) CISG, state that

> "gap-filling can be done, as we believe, by applying such interpretation methods as extensive interpretation and analogy. The admissibility of analogy is directly addressed in the wording contained in the CISG because it is aimed at obtaining, from several comparable rules, one rule for a not expressly covered fact and/or a general rule under which the fact can be subsumed."[521]

There is strong academic opinion in favour of the view that not only does CISG permit both methods of gap-filling, but also that, in the case of a gap in CISG, "the

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[518] For a clear distinction between analogical application and the recourse to general principles in the context of a uniform law, *see* Kropholler (1975), *supra* note 429, at 292 *et seq*.

[519] This distinction is important in the present writer's thesis on the methodology of CISG's interpretation, in that it will eliminate the need to resort to rules of private international law for gap-filling and thus maintain the integrity of CISG's uniform and international application and interpretation.

[520] Bonell (1987), *supra* note 113, at 80.

[521] Enderlein & Maskow (1992), *supra* note 331, at 58.

first attempt to be made is to settle the unsolved question by means of an analogical application of specific provisions".[522]

4. GAP-FILLING BY ANALOGY

One of the elements necessary for gap-filling by analogy is the discovery of a specific provision dealing with similar issues to the ones present in the gap. The method of analogical application requires examination of the provisions of CISG, because the rule laid down in an analogous provision may be restricted to its particular context and, thus, its extension to other situations would be arbitrary and contrary to the intention of the drafters or the purpose of the rule itself.[523] Where there are no special reasons for limiting the analogical application of a specific rule to another CISG provision, the interpreter must consider whether the case regulated by this rule and the gap at hand are "so analogous that it would be inherently unjust not to adopt the same solution."[524] If the answer to this question is affirmative, then the gap should be filled by an application of that rule by analogy.

There is some diversity in academic opinion on the exact test to be applied in such cases. Ferrari uses a criterion similar to that offered by Bonell, by stating that when the matters expressly settled in the Convention and the matter in question are so closely related that it would be "unjustified to adopt a different solution",[525] one can fill the gap by analogy. Professor Honnold offers a different test, placing the focus of the inquiry on whether the cases were so analogous that the drafters "would not have deliberately chosen discordant results". Only in such circumstances, according to Honnold, it would be reasonable to conclude that the rule embracing the analogous situation is authorised by Article 7(2) CISG.[526]

It is important to note that gap-filling by analogy is concerned with the application of certain rules, or solutions, taken from specific CISG provisions to be applied in analogous cases in order to resolve legislative gaps. This method should not be confused with the application of general principles that are expressed in CISG, or

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[522] Bonell (1987), *supra* note 113, at 78.
[523] *See* Bonell, *ibid.*
[524] *See* Bonell, *ibid.*, at 79. For a criticism of this criterion, *see* Rosenberg (1992), *supra* note 493, at 451 (stating that "there are inherent problems with an 'inherently unjust' test").
[525] Ferrari (1994), *supra* note 39, at 222.
[526] *See* Honnold (1991), *supra* note 53, at 156. Rosenberg (1992), *supra* note 493, at 451, prefers Honnold's test.

upon which CISG is founded. It is the present writer's contention that gap-filling by analogy is primary gap-filling. Only when no analogous solutions can be found in CISG's provisions should the interpreter resort to the application of CISG's general principles – internal and external – which is secondary gap-filling.

This is a fine, but clear, distinction. It deserves to be maintained, although there may ultimately not be a lot of practical importance attached to maintaining it, due to the tendency of commentators to blur the distinction by focusing on the use of general principles in gap-filling and the potential of general principles to dominate CISG's gap-filling function. However, the value of recognising its existence lies in the theoretical clarity and legitimacy that it adds to the consistent and systematic examination of the interpretative structure embedded in CISG.

5. "GENERAL PRINCIPLES" AND CISG

When the solution to a gap-filling problem can not be achieved by analogical application of a rule found in a specific CISG provision, gap-filling can be performed by the application of the "general principles" on which CISG is based.[527]

This procedure differs from the analogical application method,[528] in that it does not solve the case in question solely by extending specific provisions dealing with analogous cases, but on the basis of rules which may be applied on a much wider scale, due to their general character.

At this point it is appropriate to note another fine – but valid, according to the present writer – distinction in the types of general principles that concern CISG and its interpretation. The distinction must be drawn between principles extrapolated from within specific CISG provisions and general principles of comparative law – namely, those rules of private law that command broad adherence throughout various countries, or general principles of law of civilised nations – on which CISG as a whole is founded. This distinction is important in the present writer's thesis on the methodology of CISG's interpretation, in that it will assist in the elimination of the need to resort to rules of private international law for gap-filling and thus maintain the integrity of CISG's uniform and international application and interpretation.

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[527] *See* Article 7(2) CISG.

[528] For a clear distinction between the two approaches, *see* Kropholler (1975), *supra* note 429, at 292 *et seq*.

(a) Principles in CISG's provisions

Despite the clear provision for the use of CISG principles in gap-filling by Article 7(2) CISG, there is no other textual reference as to the identification of such principles and the manner of their application, once identified, in order to fill a gap in CISG. While some principles will be expressly stated in the CISG,[529] most of them will usually be extracted from provisions dealing with specific issues. A principle can be inferred from specific rules established by specific CISG provisions, if they can be considered to be expressing a more general principle that is capable of being applied to matters governed but not expressly regulated in CISG.[530]

Some general principles can be easily identified since they are expressly stated in the provisions of CISG itself. One such principle is the principle of good faith,[531] which had already been considered a general principle under the regime of ULIS.[532]

The principle of autonomy[533] is another general principle expressly outlined in CISG. Party autonomy has been described as the most important principle of CISG.[534] Some commentators have inferred from this principle that CISG plays solely a subsidiary role as it provides only for those cases which the parties neither contemplated, nor foresaw.[535] According to this premise, it is logical to conclude that in case of conflict

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[529] *See* Rosenberg (1992), *supra* note 493, at 451, fn. 54, listing some principles with references to CISG Articles.

[530] For academic support on this point, *see* Schlechtriem (1986), *supra* note 359, at 58: "The authoritative principles can be inferred from the individual rules themselves and their systematic context"; Honnold (1991), *supra* note 53, at 155: "general principles must be moored to premises that underlie specific provisions of the Convention"; Bonell (1987), *supra* note 113, at 80.

[531] Article 7(1) CISG. The good faith principle has been recognised as one of the general principles expressly laid down by the Convention. *See*, for example, Audit (1990), *supra* note 329, at 51, where the author states that good faith is one of the general principles, even though it must be considered a mere instrument of interpretation; Enderlein & Maskow (1992), *supra* note 331, at 59, where the authors list the good faith principle among those principles "which do not necessarily have to be reflected in individual rules"; R.Herber & B.Czerwenka, *Internationales Kaufrecht. Kommentar zu dem Übereinkommen der Vereinten Nationen vom 11 April 1980 überVertrage uber den Internationalen Warenkauf* [International Sales Law, Commentary on the United Nations Convention on Contracts for the International Sale of Goods - *in German*], (Beck, Munich, 1991) 49, where it is stated that the good faith principle is the only general principle expressly provided for by the Convention.

[532] *See*, *e.g.*, Wahl (1976), *supra* note 507, at 135.

[533] Article 6 CISG. *See*, for example, Honnold (1991), *supra* note 53, at 47, who in his introduction of the Convention states that "the dominant theme of the Convention is the role of the contract construed in the light of commercial practice and usage - a theme of deeper significance than may be evident at first glance".

[534] For this definition, *see* Kritzer (1989), *supra* note 394, at 114.

[535] For this thesis, *see* Honnold (1991), *supra* note 53, at 47, stating that "the Convention's rules play a supporting role, supplying answers to problems that the parties failed to solve by contract". For a similar conclusion, *see* K.Sono, "The Vienna Sales Convention: History and Perspective", in P.Sarcevic and P.Volken (eds.), *International Sale of Goods; Dubrovnik Lectures* (Oceana, NY, 1986) at 14, affirming that "the rules contained in the Convention are only supplementary for those cases where the parties did not provide otherwise in their contract".

between the parties' autonomy and any other general principle of CISG, the former always prevails.[536]

Many commentators have offered the following as examples of principles expressly enunciated in CISG, which implies that they can perform the gap-filling function that such a characterisation allows them:

- the principle that widely known and largely observed usages must be taken into account (Article 9 CISG);[537]
- the principle that, if a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it (Article 78 CISG);[538]
- the principle that "any notice or other kind of communication made or given after the conclusion of the contract becomes effective on dispatch (Article 27 CISG)";[539]
- the principle that the agreement between the parties is not subject to any formal requirement (Articles 11 and 29(1) CISG), except for the cases provided for by Article 12 CISG. [540]

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[536] *See* A.Farnsworth, "Rights and Obligations of the Seller", in Schweizerisches Institut für Rechtsvergleichung (ed.), *Wiener Ubereinkommen von 1980 uber den Internationalen Warenkauf* (Lausanner Kolloquium 1984) (Zürich: Schulthess, 1985) 83-90, at 84, where the author draws the same conclusion: "in case of a conflict between the contract and the Convention, it is the contract – not the Convention – that controls." Note that this result is "contrary to the Uniform Commercial Code where principles of 'good faith, diligence, reasonableness and care' prevail over party autonomy", *see* Kritzer (1989), *supra* note 394, at 115.

[537] *See* R.Herber, "Article 7", in von Caemmerer & Schlechtriem eds., *Kommentar zum Einheitichen UN-Kaufrecht* (Munich: Beck, 1990) 33, at 94.

[538] *See* Audit (1990), *supra* note 329, at 51. The present writer believes that the elevation of the interest provision into the category of general principles is questionable. Article 78 contains a rule establishing liability to interest, but lacks the requisite certainty or wide recognition/application of a general principle. For instance, under CISG it is not clear whether a party is entitled to recover interest on an unliquidated amount; which was the case in the Delchi case examined in detail in Chapter 5 of this thesis: *see* pp. 212-3, *infra*. Given the internationally controversial nature of interest, the final language of Article 78 CISG was a drafting compromise among the Contracting States: *see* Darkey (1995), *supra* note 706, the text corresponding to fn.46, where she mentions that some States prohibit or limit the rate of interest due to religious or public policy rationales. It is the present writer's opinion that full compensation is the principle that underlies generally the provisions of CISG on the buyer's remedies (Articles 45, 46 CISG) and the seller's remedies (Articles 61, 62 CISG). The principle of full compensation underlies the provisions dealing with the measure of damages for breach (Article 74 CISG, including loss of profit; Article 75 CISG, dealing with a contract/cover differential; Article 76 CISG, dealing a contract/ market differential; Article 78 CISG declaring interest to be paid on any payment that is in arrears), as well as the provisions dealing with the effect of avoidance (Article 81(2) CISG, requiring restitution for goods already delivered or payments made; Article 84(1) CISG, requiring the seller to refund price already paid plus interest; Article 84(2) CISG, requiring the buyer to account for benefits derived from the goods) and the provisions relating to the preservation of goods (Articles 85 and 86 CISG, entitling the seller and the buyer respectively to reimbursement for costs incurred; and Article 88(3) CISG, endorsing both parties' right to reimbursement for preserving and selling the goods).

[539] Bonell (1987), *supra* note 113, at 80.

[540] *See* Bonell, *ibid.*

The present writer holds reservations – based on theoretical objections – regarding the characterisation of the above provisions as "general principles", and is of the opinion that they are no more than rules set out in CISG. A general principle stands at a higher level of abstraction than a rule, or might be said to underpin more than one such rule. For example, the principle of party autonomy, also recognised in Article 6 CISG, mandates that effect be given to the intentions of the parties, no matter in what form those intentions may be expressed. This principle of party autonomy can be said to underpin the rules set out in Articles 11 and 29(1) CISG. Most general principles have not been expressly provided by CISG. Therefore, they must be deduced from its specific provisions by the means of an analysis of the contents of such provisions. If it can be concluded that they express a more general principle, capable of being applied also to cases different from those specifically regulated, then they could also be used for the purposes of Article 7(2) CISG. There is a notable divergence of opinion as to the exact nature of such an analysis of specific CISG provisions. Bonell states that

> "just as in interpreting specific terms and concepts adopted in the text of the Convention, also in specifying 'general principles' courts should, in accordance with the basic criteria of Article 7(1), avoid resorting to standards developed under their own domestic law and try to find the particular solution 'autonomously', *i.e.*, within the Convention itself, or, should this not be possible, by using standards which are generally accepted at a comparative level".[541]

Bonell's argument relies on the premise that, although there are principles, such as that of the party autonomy and the dispatch rule, which can be directly applied, others, such as the principle of good faith and the concept of "reasonableness", need further specification in order to offer a solution for a particular case.

The question that arises here relates to the standards to be used for the purpose of the identification of the principles that belong to the latter category of principles. For example, how could a judge of a highly industrialised country apply the "reasonableness" test in order to determine which party in a particular circumstance has been acting with due diligence? Surely, the judge should not automatically refer to the standards of care and professional skill normally required from national business people in domestic affairs. Bonell is of the opinion that the answer should

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[541] Bonell (1987), *supra* note 113, at 81-82.

be found "either in the Convention itself or at least on the basis of standards which are currently adopted in other legal systems".[542]

On the other hand, there is strong academic opinion that comparative law should not be used to identify such general principles. Enderlein and Maskow are of the opinion that it is

> "not possible to obtain the Convention's general principles from an analysis prepared by comparison of the laws of the most important legal systems of the Contracting States ... as it was supported, in some cases, in regard to Article 17 of ULIS. ... The wording of the Convention does in no way support the application of this method."[543]

In addressing this issue, tribunals must be conscious of the mandate in Article 7(1) CISG, that regard is to be had to CISG's international character and the need to promote uniformity in its application. Although Bonell's model is not the same as resorting to rules of private international law, the temptation to adopt a domestic law analysis of the problem should be resisted. Tribunals must recognise the uniquely international nature of CISG and its proper function as uniform law. Bearing in mind what has already been said about the potential dangers to the autonomy and uniformity of CISG's interpretation and application that the use of different domestic concepts and laws carry, it seems that the latter, rather than the former, opinion is better. It is hoped that the difficulties that can arise, lets say, in a dispute between a German seller and a Zambian buyer, relating to a notice of non-conformity "within a reasonable time" under Article 39 CISG, can be solved in a way that respects CISG's character and objectives – bearing in mind the different perceptions that exist in these two countries as to time. The suggestion of the present writer on this hypothetical dispute is that the concept of reasonableness might be allied with the provision on usage (under Article 9 CISG) to permit regional variation of due diligence.

Irrespective of the result in the debate as to the theoretical justification of the method of extracting general principles by analysing the contents of specific provisions of CISG, in practice, several general principles can be deduced by this method and then applied to cases not specifically regulated by any of CISG's provisions. The following is a list of such general principles,[544] although one should not be dogmatic

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[542] Bonell, *ibid.*, at 82.

[543] Enderlein & Maskow (1992), *supra* note 331, at 60. *See also* Ferrari (1994), *supra* note 39, at 224.

[544] For a discussion on some of the following principles, *see* Honnold (1991), *supra* note 53, at 129-132, 219, 417-425.

in such classifications as sometimes it is not sufficiently clear whether something is a general principle underpinning certain rules or merely a rule.

- the principle of "reasonableness",[545] according to which the parties "must conduct themselves according to the standard to the reasonable person".[546] In CISG there is further reference to the concept of "reasonableness" in the context of the time that a particular act must be performed or a notice given,[547] which distinguishes between "reasonable" and "unreasonable" expense, inconvenience, or excuse.[548] These references demonstrate that, under CISG, the concept of "reasonableness" constitutes a "general criterion for evaluating the parties' behaviour to which one may resort in the absence of any specific regulation".[549] However, even though it cannot be doubted that the concept of "reasonableness" is a general principle[550] – it has even been defined as a "fundamental principle" of CISG[551] – it is uncertain what kind of reasonableness one must take into account. This problem must be solved by taking into account the Convention's international character, in order for the acceptance of the same interpretation of this concept to be most probable in the different political and legal groups of Contracting States;[552]
- the principle of mitigation, which provides that the parties relying on a breach of contract must take reasonable measures to limit damages resulting from the breach of the contract;[553]
- the principle of co-operation, according to which the parties must co-operate "in carrying out the interlocking steps of an international sales transaction".[554] This

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[545] It is common understanding that the concept of "reasonableness" constitutes a general principle: *see*, *e.g.*, Audit (1990), *supra* note 329, at 51; Herber (1990), *supra* note 537, at 94.
[546] Schlechtriem (1986), *supra* note 359, at 39.
[547] CISG Articles 18(2), 33(3), 39(1), 43(1), 47, 49, 63, 64, 65, 73(2).
[548] CISG Articles 34, 37, 48, 87, 88(2) and (3).
[549] Bonell (1987), *supra* note 113, at 81.
[550] "[N]obody can doubt that the concept of reasonableness is a general principle of the convention": Maskow (1981), *supra* note 359, at 57. *See* CISG Articles 8(2) and (3), 25, 35(1)(b), 60, 72(2)), 75, 77, 79(1), 85, 86, 88(2).
[551] *See* P.Schlechtriem, Einheitliches UN-Kaufrecht. Das Übereinkommen der Vereinten Nationen über internationale Warenkaufverträge – Darstellung und Texte [Uniform UN-Sales Law. The CISG – description and texts – in German], (Tübingen, Mohr, 1981) 25.
[552] *See* Ferrari (1994), *supra* note 39, at 225.
[553] CISG Articles 77, 85-88. For this principle, *see*, *e.g.*, Honnold (1991), *supra* note 53, at 15, and Audit (1990), *supra* note 329, at 52. However, it could be argued that this is merely a rule – often propounded by the courts in Common Law countries and also found in many of the Codes of European countries – that is a manifestation of the general principles of "reasonableness" and "avoiding waste" (*see* Art. 61 CISG, *plus* the text to fn. 660, *infra*).
[554] Kritzer (1989), *supra* note 394, at 115. *See* CISG Articles 32(3), 48(2), 60(a), 65.

duty is closely related to the duty to communicate "information that is obviously needed by a trading partner,"[555] and to the principle that a party can not contradict a representation on which the other party has reasonably relied, [556] (*i.e.*, that the parties must not act *venire contra factum proprium*);[557]

- the principle of *favor contractus,* which means that "whenever possible, a solution should be adopted in favour of the valid existence of the contract and against its premature termination on the initiative of one of the parties."[558]

In Article 74, CISG also contains a rule with civil law origins,[559] which limits recoverable damages to those that are foreseeable.[560] There are other rules that are considered to be general principles as well, by some commentators, but generally there is no universal agreement as far as their legitimate qualification is concerned.[561]

(b) Principles of comparative law on which CISG is based

As was argued earlier in this chapter, a distinction must be drawn between those principles extrapolated from within specific CISG provisions and the general principles of comparative law on which CISG as a whole is founded. This distinction is important in the present writer's thesis on the methodology of CISG's interpretation, because it provides the theoretical framework for the introduction of the UNIDROIT Principles – as part of the "general principles" on which CISG is based – into the gap-filling function of Article 7(2) CISG.

Although CISG preceded the UNIDROIT Principles, the present writer argues that CISG can be said to be "based" upon the Principles because the latter also form part

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[555] Honnold (1991), *supra* note 53, at 155.

[556] *See* Articles 16(2)(b), 29(2) CISG.

[557] For similar affirmations, *see*, *e.g.*, Eorsi (1984), *supra* note 221, at 2-12; Herber (1990), *supra* note 537, at 94; Maskow (1981), *supra* note 359, at 57. For a discussion of this principle, *see* Honnold (1991), *supra* note 53, at 152-4.

[558] Bonell (1987), *supra* note 113, at 81. *See* CISG Articles 19(2), 25, 26, 34, 37, 48, 49, 59, 51(1), 64, 71 and 72.

[559] Some authors consider the foreseeability rule outlined in CISG as being based on common law; *see*, *e.g.*, Herber & Czerwenka (1991), *supra* note 531, at 333: "The limitation to foreseable damages comes from Anglo-American law"; G.Reinhart, *UN-Kaufrecht, Kommentar zum Übereinkommen der Vereinten Nationen vom 11.April 1980 über Verträge über den internationalen Warenkauf* [UN-Sales Law, Commentary on the CISG - *in German*], (C.F.Müller, Heidelberg, 1991) 170 (stating the same). This view has been opposed by several authors favouring the view that the foreseeability rule is based upon French law, in particular upon Pothier's teaching; *see*, *e.g.*, R.Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition* (1988) 830. For a more detailed discussion of the origin of the rule and its reception in different countries, *see* F.Ferrari, "Comparative Ruminations on the Forseeability of Damages in Contract Law", 53 *La. L. Rev.* (1993) 1257.

[560] *See*. *e.g.*, Maskow (1981), *supra* note 359, at 57.

[561] For instance, Enderlein & Maskow (1992), *supra* note 331, at 60, are of the view that specific performance is also a general principle, something which is not included in lists of general principles produced by other commentators.

of the new international legal order to which CISG belongs. The temporal discordance of the two instruments should not be used to hide their similarities in origin and substance, or to impede their common purpose, which is the unification of international commercial law. In essence, the word "based", in Article 7(2) CISG, should be given a substantive and thematic nuance, which is broader than the one merely signifying a strict temporal correlation.

It is asserted by the present writer that the UNIDROIT Principles can and should assist in the elimination of the need to resort to rules of private international law for gap-filling, and thus help to maintain the integrity of CISG's uniform and international application and interpretation. Even in cases where the international sales contract is governed by CISG, the UNIDROIT Principles may serve an important purpose. The principles and criteria for the proper interpretation of CISG are laid out in Article 7(1) CISG, and for gap-filling in Article 7(2) CISG. Particularly, in Article 7(2) CISG reference is made to:

> " Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based..."

The pervasive influence of the UNIDROIT Principles in international trade law includes the use of the UNIDROIT Principles as a guide in contract negotiations. Although not expressly mentioned in their Preamble as one of their purposes, this has also turned out to be one of the most important ways in which they are being used in practice.[562]

The use of the UNIDROIT Principles as *lex contractus* is also significant. A UNIDROIT Secretariat's survey has revealed that among those who chose the UNIDROIT Principles as the law governing the contract, half did so by expressly referring to the Principles in the contract and the other half by considering the UNIDROIT Principles as an expression of "general principles of law", the *lex mercatoria*, or the like (almost a third specifying they had done so on more than one occasion).[563] This last point offers direct support to the present writer's thesis that the UNIDROIT Principles can play an important role in CISG's interpretation under

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[562] This phenomenon is certainly also due to the fact that the Principles have been translated into many languages, thus overcoming language barriers. For the actual figures on this point, *see* Bonell's analysis of the UNIDROIT Secretariat's questionnaire, in M.J.Bonell, "The UNIDROIT Principles in Practice – The Experience of the First Two Years", *Uniform Law Review* (1997) 34, also available on the CISG web site of Pace University on the internet.

[563] For a more detailed presentation and commentery on these figures, *see* Bonell, *ibid.*

Article 7(2) CISG, by being utilised as an expression of the "general principles" upon which CISG is based and thus rendering the recourse to conflict of laws rules redundant in that context.

Further evidence of the wide acknowledgement that the UNIDROIT Principles reflect general principles of private law is provided by a survey of arbitral awards. The potential value of the UNIDROIT Principles to Article 7(2) CISG is evidenced by some arbitral awards rendered by the Court of Arbitration of Berlin in 1992, the Court of Arbitration of the International Chamber of Commerce in 1995 and 1996 [564] and an unpublished decision of the Court of Appeal of Grenoble.[565] In those instances, the UNIDROIT Principles were applied as a means of interpreting the applicable domestic law to demonstrate that a particular solution provided by the applicable domestic law corresponds to the general principles of law as reflected in the UNIDROIT Principles.

There are even awards in which the UNIDROIT Principles were chosen as the law governing the contract, implicitly considering the UNIDROIT Principles as a source of the *lex mercatoria* and a reflection of wide international consensus.

Three of these awards have been rendered by the Court of Arbitration of the International Chamber of Commerce. [566] The first award concerns a series of contracts for the supply of equipment concluded by an English company and a governmental agency of a Middle East country. The contracts referred to "principles of natural justice", not specified further, as the applicable law. In a partial award, rendered in 1995, on the question of the law applicable to the substance of the dispute, the arbitral tribunal, after a detailed analysis of the origin and nature of the UNIDROIT Principles, concluded that the latter are today the most genuine expression of general rules and principles enjoying wide international consensus and as such should be applicable as the law governing the contracts in question.

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[564] *See* the references in D.Maskow, "Hardship and Force Majeure", 40 *American Journal of Comparative Law* (1992) 657, at 665.

[565] Unpublished, 24 January 1996. *Cf.* the summary published in the *Uniform Law Review* (1997) 1.

[566] For extensive references, *see* P.Lalive, "L'arbitrage international et les Principes UNIDROIT" [International arbitration and the UNIDROIT Principles – *in French*] in Bonell/Bonelli eds., *Contratti Commerciali Internazionali e Principi UNIDROIT* (Milan: Giuffrè, 1997) 71-89. *See also* K.Boele-Woelki, "Principles and Private International Law – The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract law: How to Apply Them to International Contracts", in *Uniform Law Review* (1996) 652, at 661, who points out that "[t]his significant award may be regarded as the official entry of the Principles into international arbitration."

The second award, rendered in 1995, concerns a contract between a United States company and a governmental agency of a Middle East country, containing a provision according to which any disputes which might arise would be settled on the basis of "Anglosaxon principles of law", which were not specified further. This was sufficient to induce the arbitral tribunal to refer expressly to the UNIDROIT Principles, and, in particular, to the rules on interpretation contained therein.

The third award concerns a contract between an Italian company and a governmental agency of a Middle East country. The contract did not contain any choice of law clause, since both parties had insisted on the application of their own national law. In a partial award, the arbitral tribunal declared that it would base its decision on the "terms of the contract, supplemented by general principles of trade as embodied in the *lex mercatoria*". On the basis of this decision, the same arbitral tribunal subsequently, when dealing with the merits of the dispute, referred, with no further explanation, to individual provisions of the UNIDROIT Principles, thereby implicitly considering the latter a source of the *lex mercatoria*. Thus, apart from another partial award on some preliminary questions of substance, in which it referred to the UNIDROIT Articles 4.8 ("Supplying omitted terms") and 4.6 ("*Contra proferentem* rule"), in its final award, rendered in 1996, the arbitral tribunal invoked the UNIDROIT Articles 7.4.1 ("Right to damages"), 7.4.7 ("Harm due in part to aggrieved party") and 7.4.13 ("Agreed payment for non-performance") in support of its reasoning.

Another award of this kind was rendered by the National and International Court of Arbitration of Milan.[567] That case concerned a contract of commercial agency between an Italian and a United States company. The contract did not specify the applicable law, but at the outset of the arbitral proceeding the parties agreed that the dispute would be settled "in conformity with the UNIDROIT Principles tempered by recourse to equity". In its decision, the sole arbitrator applied a number of individual articles of the UNIDROIT Principles.

The UNIDROIT Principles, being regarded as a clear expression of "general principles" of private law, could offer considerable assistance in the interpretation of CISG by clarifying the language of CISG, by filling gaps in CISG and by working with CISG in an expanded role, in order to achieve the uniformity of interpretation

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[567] Award No. 1795 of 1 December 1996.

and application that the drafters of CISG had intended. The following section of this work examines that proposed role of the UNIDROIT Principles.

6. THE UNIDROIT PRINCIPLES AND CISG

(a) The UNIDROIT Principles – an introduction

In producing CISG, UNCITRAL drew heavily on earlier work by the International Institute for the Unification of Private Law ("UNIDROIT"), under whose auspices the precursors to CISG had been drafted.[568] The *UNIDROIT Principles of International Commercial Contracts*[569] was produced under the auspices of UNIDROIT, with the participation of many legal scholars from a considerable number of countries, and it is the result of the efforts put in by many of the same individuals who had been involved for a considerable number of years in the drafting of CISG. The UNIDROIT Principles have been greeted as "a significant step forward in the globalisation of legal thinking".[570]

Even a scant examination of the UNIDROIT Principles reveals that they bear a significant degree of similarity to the provisions of CISG. However, despite the general affinity that exists between the two instruments, there are three significant differences.[571] The first difference is one of scope. CISG is limited to contracts for the sale of goods and, furthermore, it avoids many issues relevant to sales contracts. For example, CISG avoids the question of contractual validity.[572] On the other hand, the UNIDROIT Principles are far broader in scope, since they deal not only with the broad range of commercial contracts, but also with some questions of validity.[573]

A second variance between the UNIDROIT Principles and CISG is said to be the degree of maturity that each instrument has reached; a parameter which has to do with the quality of the solution that their respective provisions afford to certain

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[568] Honnold (1991), *supra* note 53, at § 4-10. The drafters relied upon the Convention Relating to A Uniform Law on the Formation of Contracts for the International Sale of Goods (1964) (*a.k.a.* ULF), 834 *U.N.T.S.* (1972) 107, and the Convention Relating to A Uniform Law on the International Sale of Goods (1964) (a.k.a. ULIS), 834 *U.N.T.S.* (1972) 169. *Ibid.*, at § 4.

[569] International Institute for the Unification of Private Law (UNIDROIT), *Principles of International Commercial Contracts* (1994).

[570] *See* J.M.Perillo, "UNIDROIT Principles of International Commercial Contracts: The Black Letter Text and a Review", 63 *Fordham Law Review* (1994) 281, at 282.

[571] *See* Perillo, *ibid.*, at 282-3.

[572] *See* Article 4 CISG. *See generally*, H.E.Hartnell, "Rousing the Sleeping Dog: The Validity Exception to the Convention for the International Sale of Goods", 18 *Yale J. Int'l L.* (1993) 1, where the author discusses the range of interpretations available to adjudicators and proposes a "middle of the road" approach).

[573] *See* Articles 3.1 and 3.2 UNIDROIT Principles.

inveterately difficult issues in international contracts, such as the notorious problem of the "battle of the forms". The innovative way in which the Principles deals with the "battle of the forms"[574] represents a considerable improvement over the timorous draftsmanship found in the respective provision of CISG.[575] To the extent that the two documents cover the same ground, it has been said that "the Principles is a better, more mature product".[576]

The third distinction between the UNIDROIT Principles and CISG relates to characterisation. The instrument of the UNIDROIT Principles, contrary to CISG, is not intended for adoption as a treaty, or as a uniform law; rather, the document is in the nature of a non-binding "Restatement" of the existing international commercial contract law. The nature and the potential of the function of such a "Restatement" are highlighted in the Preamble of the UNIDROIT Principle, which reads as follows:

> These Principles set forth general rules for international commercial contracts.
>
> They shall be applied when the parties have agreed that their contract be governed by them.
>
> They may be applied when the parties have agreed that their contract be governed by "general principles of law", the "*lex mercatoria*" or the like.
>
> They may provide a solution to an issue raised when it proves impossible to establish the relevant rule of the applicable law.
>
> They may be used to interpret or supplement international uniform law instruments.
>
> They may serve as a model for national and international legislators.

When deciding the publication of the UNIDROIT Principles, in 1994, the Governing Council of UNIDROIT recommended their widest possible distribution and stressed the need "... to monitor their use with a view to a possible reconsideration of them at some time in the future".[577] After two interlocutory reports by the UNIDROIT Secretariat, containing information as to the distribution of the UNIDROIT Principles in practice,[578] the general perception is that the UNIDROIT Principles

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[574] *See* Article 2.22 UNIDROIT Principles.
[575] *See* Article 19 of CISG.
[576] Perillo (1994), *supra* note 570, at 283.
[577] *Cf.* "Report on the 73rd Session of the Governing Council" (Rome, 9-13 May 1994), UNIDROIT 1994, C.D. (73) 18, at 22.
[578] *Cf.* UNIDROIT 1995, C.D. (74) 9 and UNIDROIT 1996, C.D. (75) 8.

have enjoyed a very favourable reception in the international business and legal community.[579]

The UNIDROIT Principles have also created great interest in academic and professional circles. Over the years they have been the subject of numerous seminars and colloquia in many parts of the world,[580] and have been discussed in a growing number of scholarly writings published in legal journals world-wide,[581] in a tone that has generally been very positive.[582]

The UNIDROIT Principles have moreover been included by a great number of Law Schools and Universities, all over the world, in their courses and/or teaching materials.[583]

The UNIDROIT Principles have also served as an important source of inspiration in some of the most recent codifications, in the sense that they have served as a model for national and international legislation. This can be said of the new Dutch Civil Code, the new Civil Code of Quebec and, more recently, the new Civil Code of the

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[579] More than 3,000 copies of the volume containing the integral version of the UNIDROIT Principles had been sold worldwide within a short time of publication, *see* Bonell (1997), *supra* note 562, at 34 – 45, where Bonell discusses the success of a formal inquiry in the form of a questionnaire that was launched in 1996 with a view to gathering more detailed information as to the different ways in which the UNIDROIT Principles have been used in practice so far.

[580] Some of them were held even before the adoption of the final version of the UNIDROIT Principles. This was the case of the seminar held in January 1992 at the Law School of the University of Miami; *cf.* 40 *American Journal of Comparative Law* (1992), containing contributions by M.J.Bonell, U.Drobnig, E.A.Farnsworth, M.Fontaine, M.P.Furmston, R.Hyland, D.Maskow, A.Rosett and D.Tallon; the seminar held in December 1993 in Rome, organised by the Centre for Latin American Studies and the Centre for Comparative and Foreign Studies, *cf.* M.J.Bonell & S.Schipani (eds.), *"Principi per i contratti commerciali internazionali" e il sistema giuridico latinoamericana* [- in Italian] (Padova, CEDAM 1996); and the seminar held in February 1994 at the Law School of Tulane University in New Orleans, *cf.* 3 *Tulane Journal of International and Comparative Law* (1994), containing contributions by E.A.Farnsworth, A.Hartkamp, M.J.Bonell, A.M.Garro, O.Lando, M.Evans.

Of the seminars held after the publication of the UNIDROIT Principles, mention may be made, among others, of the seminars held in October 1994, in Paris, at the International Chamber of Commerce and in November 1994, in Milan, at the National and International Court of Arbitration, *cf.* Institute of International Business Law and Practice (ed.), *"UNIDROIT Principles for International Commercial Contracts: A New Lex Mercatoria?"*, ICC Publication n° 490/1 (1995); the seminar held in October 1995, in Rome, organized by the Journal Diritto del Commercio Internazionale; the Inter-American Congress held in November 1996, at the University of Carabobo, Valencia (Venezuela); the seminar held in November 1996 at the Universidad Panamericana, in Mexico City; and the Congress of the International Academy of Comparative Law in Bristol, in 1998.

[581] For an extensive bibliography, *see* M.J.Bonell, *Un "codice" internazionale del diritto dei contratti: i principi UNIDROIT del contratti commerciali internazionali* [- in Italian] (Giuffrè, Milan, 1995), at 410-440; for further updates, *see*: *Uniform Law Review* (1996) 210-213, 423, 626-628, 808.

[582] The intrinsic quality of the UNIDROIT Principles has also been confirmed by the UNIDROIT Secretariat's inquiry: *see* Bonell (1997), *supra* note 562.

[583] According to the UNIDROIT Secretariat's inquiry their total number is 95; *see* Bonell (1997), *supra* note 562, fn.12.

Russian Federation.[584] References to individual provisions of the UNIDROIT Principles may also be found in the Final Report of the Commission for the Revision of the German Law of Obligations.[585] After the publication of the UNIDROIT Principles, the Estonian Government officially declared that it considered them one of the most important and authoritative sources of inspiration in the drafting of the new law on obligations.[586] Likewise, most of the provisions of the draft Civil Code of the Republic of Lithuania, dealing with contracts in general, follow very closely the UNIDROIT Principles,[587] and the same is expected to occur regarding the new Czech Civil Code, currently under preparation.[588] Also, the Scottish Law Commission, in its proposals for the reform of the rules on interpretation of legal acts, expressly refers to specific provisions contained in Chapter 4 of the UNIDROIT Principles, namely to Articles 4.1 and 4.2, 4.4, 4.5, 4.6 and 4.7.[589]

Outside Europe, mention may be made of the recent drafts for the revision of Article 2 of the Uniform Commercial Code, concerning sales contracts,[590] the draft of a new Commercial Code of Tunisia[591] and the draft Uniform Law on General Commercial Law ("*Loi uniforme relative au droit commercial general*"), which is currently being prepared by the 15 member States of the Organization for the Harmonization of Business Law in Africa ("*Organisation pour l'Harmonisation en Afrique du Droit*

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[584] *Cf.* A.Komarov, "The UNIDROIT Principles of International Commercial Contracts: A Russian View", *Uniform Law Revue* (1996) 247 *et seq.*, at 249: "In relation to the new Russian civil code the Principles have already played the role indicated for them in the Preamble ... in the sense that they have served as a model for national legislation."

[585] *Cf.* Bundesminister der Justiz (ed.), *Abschluíbericht der Kommission zur áberarbeitung des Schuldrechts*, (Koln, 1992) 149 and 165.

[586] *See* the letter of 8 June 1995 from the Ministry of Justice of Estonia to UNIDROIT: "At present time we're elaborating a new draft law of obligations of the Estonian Republic. The UNIDROIT Principles of International Commercial Contracts is certainly one of the most important and authoritative sources for drafters of the new law of obligations because it contains a positive experience of different States."

[587] *Cf.* Part II, Book 5 ("Contract Law") of the draft Civil Code, as submitted to the Parliament of Lithuania in September 1996. The provisions of the UNIDROIT Principles which have been, more or less, literally taken are: Articles 1.1 - 1.4 and 1.7 of Chapter 1, Articles 2.1 - 2.16 and 2.20 - 2.22 of Chapter 2, Article 3.10 of Chapter 3, the entire Chapter 4, Articles 5.1 - 5.3 and 5.6 - 5.8 of Chapter 5, Articles 6.1.1 - 6.1.6 and 6.1.14 - 6.1.17 of Chapter 6, Section 1, the entire Section 2 of Chapter 6 and the entire Sections 1, 2 and 3 of Chapter 7.

[588] On this point, Bonell refers to information received from one of the members of the Codification Commission. The relevant provisions of the UNIDROIT Principles are Arts. 2.1 to 2.11, 4.1 to 4.6, 7.1.7, 7.4.2 to 7.4.6 and 7.4.13; *see* Bonell (1997), *supra* note 562, the text corresponding to fn. 17.

[589] *Cf.* Scottish Law Commission, *Discussion Paper No. 101, Interpretation in Private Law*, (August 1996) 23, 33, 52, 55 and 58, respectively.

[590] *Cf.* The American Law Institute, *Uniform Commercial Code Revised Article 2. Sales*, Council Draft No. 2 (November 1, 1996), with references to specific providions of the UNIDROIT Principles at pp. 5 (Article 2.19 (2)), 16 (Article 1.2), 25 (Article 2.20) and 112 (Article 7.1.4).

[591] Information supplied in a reply to the UNIDROIT Secretariat's questionnaire; *see* Bonell (1997), *supra* note 562.

des Affaires") and was established in 1993.[592] Furthermore, specific provisions of the UNIDROIT Principles have been chosen as the basis for a tentative draft code prepared by a member of the New Zealand Law Commission and intended to lay down the basic principles of the New Zealand law of contracts.[593]

It is evident that the UNIDROIT Principles have already had a significant influence on national and international codifications of private law world-wide, among countries of divergent social, legal and cultural modes. However, it is the interpretative and supplementary function of the UNIDROIT Principles that is of special interest to us, because even in cases where the international sales contract is governed by CISG, the UNIDROIT Principle may serve an important purpose by being utilised as a means of interpreting and supplementing CISG.[594]

(b) Clarifying CISG language

The UNIDROIT Principles can be utilised to help clarify the often opaque, or vague, language found in the provisions of CISG.

According to Article 7(1) CISG:

> "In the interpretation of this Convention regard is to be had to its international character and to the need to promote uniformity in its application [...]".

The UNIDROIT Principles could considerably facilitate the task of finding the principles and criteria for the proper interpretation of CISG. For example, one of the most important concepts in CISG is the "fundamental breach" of a contract. CISG deals with this concept in Article 25, with the following, rather cryptic, provision:

> " A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result."

The criteria laid down in Article 7.3.1 of the UNIDROIT Principles, for the determination of whether or not there has been a "fundamental breach" of contract,

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[592] Information supplied in a reply to the UNIDROIT Secretariat's questionnaire. The member States of OHADA (French acronym of the Organization for the Harmonization of Business Law in Africa) all belong to the so-called "Zone Franc": Benin, Burkina-Faso, Comores, Ivory Coast, Mali, Senegal, Niger, Chad, Cameroun, Congo, Gabon, Equatorial Guinea, Guinea-Bissau, Central African Republic and Togo.

[593] *Cf.* R. Sutton, Commentary on "Codification, Law Reform and Judicial Development", Appendix - Tentative Scheme for a Draft Code, in 9 *Journal of Contract Law* (1996) 204-205. The provisions in question are Arts. 1.1, 1.3 - 1.5, 3.3, 3.8 - 3.12, 3.16 - 3.18, 7.1.1, 7.1.2, 7.1.7, 7.3.3 - 7.3.6 and 7.4.2 - 7.4.9.

may be used for a better understanding of this rather opaque CISG provision. In addition to the general criterion laid down in Article 25 CISG (*i.e.*, the fact that the non-performance must substantially deprive the aggrieved party of what it was entitled to expect under the contract, provided the other party could not reasonably have foreseen such a result), paragraph 2 of Article 7.3.1 UNIDROIT Principles indicates as further factors to be taken into account in each single case, whether:

> "...
>
> (b) strict compliance with the obligation which has not been performed is of essence under the contract;
>
> (c) the non-performance is intentional or reckless;
>
> (d) the non-performance gives the aggrieved party reason to believe that it can not rely on the other party's future performance;
>
> (e) the non-performing party will suffer disproportionate loss as a result of the preparation or performance if the contract is terminated."

Yet another example of the potential utilisation of the UNIDROIT Principles in clarifying the language of CISG's provisions may be found in Section IV of CISG. More specifically, Article 79 CISG provides for the exemption of a defaulting party from liability for a failure to perform any of his obligations, in certain situations where the failure was due to an impediment beyond that party's control. In Article 79(5) CISG it is stated that:

> "Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention."

The generic language used in this paragraph may be misunderstood as if the remedy of specific performance were always available in situations covered by Article 79 CISG.[595] The corresponding provision of the UNIDROIT Principles can be found in Article 7.1.7 (4):

> "Nothing in this article prevents a party from exercising a right to terminate the contract or to withhold performance or request interest or money due."

This provision – by expressly mentioning among the remedies still available to the injured party the right to terminate, to withhold performance and to request interest on money due, but not the right to performance – makes it clearer than Article 79(5) CISG that the remedy of specific performance is not always available and has to be

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[594] Although, in view of its binding nature, CISG will take precedence over the UNIDROIT Principles whenever the requirements for its application exist.

[595] On this point, and for further references, *see* Honnold (1991), *supra* note 53, at Ch. 4, p.551, *et seq.*

considered in each single case, in accordance with the criteria laid down for its availability in general.

(c) Filling gaps in CISG

The UNIDROIT Principles may also be used to fill gaps found in CISG. According to Article 7(2) CISG:

> "Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based..."[596]

It is each judge's, or arbitrator's, task to determine those general principles and from these general principles to derive the solution for the specific question to be settled, on a case by case basis. The latter task could be facilitated by resorting to the UNIDROIT Principles. The only condition that needs to be satisfied is to show that the relevant provisions of the UNIDROIT Principles are the expression of a general principle underlying CISG. This point seems to have been missed by a section of scholarly opinion. For instance, Drobnig has rejected the idea of resorting to the UNIDROIT Principles in the context of Article 7 CISG, arguing that

> "Article 7 para 2 refers for matters governed by the Convention to the general principles on which the Convention is based [...] And if there are no such principles, the provision refers to the law applicable by virtue of the rules of private international law [...] Thus there does not seem to be any room for recourse to the UNIDROIT Principles [in interpreting and supplementing CISG]." [597]

It seems that Drobnig is treating the UNIDROIT Principles as a formal source of law which, since not listed in Article 7(2) CISG, may not be invoked. The Principles are actually more like a useful summary of what might be obtained *via* a comparative legal survey.

The balance of academic opinion, however, seems to be that Article 7(2) CISG legitimises resorting to the UNIDROIT Principles as a means of interpreting and supplementing CISG, as long as there is a gap in CISG and the relevant provisions of

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[596] Only in the absence of such general principles does the same article permit as a last resort reference to the domestic law applicable by virtue of the rules of private international law.

[597] U.Drobnig, "The Use of the UNIDROIT Principles by National and Supranational Courts" (paper presented at the colloquium on *"Les contrats commerciaux et les nouveaux Principes UNIDROIT: Une nouvelle lex mercatoria?"*, organised by the ICC Institute of International Business Law and Practice in Paris, 20-21 October 1994), at page 8.

the UNIDROIT Principles are the expression of a general principle underlying CISG and not inconsistent with the CISG provision in question.[598]

For example, Articles 6.1.7, 6.1.8 and 6.1.9 of the UNIDROIT Principles may provide an answer to the questions not expressly settled in CISG, of whether – and if so, under what conditions – the buyer is entitled to pay by cheque, or by other similar instruments, or by a fund transfer, and in which currency payment is to be made. As has been explained earlier, one of the general principles on which CISG is based is that of reasonableness.[599] The duty of the parties to act in a reasonable manner clearly underlies the rule laid down in Article 6.1.7 of the UNIDROIT Principles, according to which the obligor may pay

> "(1) ... in any form used in the ordinary course of business at the place for payment"

but the obligee who accepts a cheque or other similar instrument

> "(2) ... is presumed to do so only on condition that it will be honoured".

The duty of the parties to act in a reasonable manner is also evident in Article 6.1.8 of the Principles, which deals with payment by funds transfer:

> "(1) Unless the obligee has indicated a particular account, payment may be made by a transfer to any of the financial institutions in which the obligee has made it known that it has an account"

In a similar "reasonable" tone, Article 6.1.9 states that, even if a monetary obligation is expressed in a currency other than that of the place for payment, payment may be made in that latter currency unless, apart from an agreement to the contrary between the parties, that currency is not freely convertible.

Further instances, where provisions of the UNIDROIT Principles may be used to fill gaps in CISG, are paragraphs 1 and 2 of Article 7.4.9 on interest and Article 7.4.12 on the currency in which damages are assessed. The questions of the time from which the right to interest accrues, or of the rate of interest to be applied, and that of the currency in which to assess damages, are not expressly settled in any of CISG's

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[598] *See* M.J.Bonell, "The UNIDRPOIT Principles of International Commercial Contracts and CISG – Alternatives or Complementary Instruments?" *Uniform Law Review* (1996) 26, at 33. For evidence of favourable opinion on the possible use of the UNIDROIT Principles in interpreting and supplementing CISG, *see also*, *ibid.*, the references to: S.N. Martinez Cazon, "A Practitioner's View of the Applicability of the UNIDROIT Principles of International Commercial Contracts in Interpreting International Uniform Laws", (paper presented at the 25th IBA Biennial Conference held in Melbourne, 9-14 October 1994) 3; F.Enderlein, "The UNIDROIT Principles as a Means for Interpreting International Uniform Laws" (paper presented at the 25th IBA Biennial Conference held in Melbourne, 9-14 October 1994) 12.

[599] *See*, *e.g.*, Bonell (1987), *supra* note 113, at 80.

provisions. However, since the principle of full compensation can be considered to be a general principle underlying CISG,[600] these gaps may well be filled by the above mentioned articles of the UNIDROIT Principles which are inspired by the same principle.[601]

Article 7.4.9 of the UNIDROIT Principles states that the aggrieved party is entitled to interest "from the time payment is due" (paragraph 1) and that the applicable interest rate shall be

> "... the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment or, where no such rate exists at that place, the same rate in the State of the currency of payment. In the absence of such a rate at either place the appropriate rate fixed by the law of the State of the currency of payment"(paragraph 2)

From the above, it can be concluded that the UNIDROIT Principles clearly intended to make sure that the interest to be paid covers to the greatest possible extent the loss actually suffered by the aggrieved party as a consequence of the non-payment of the sum of money due.[602] The same idea is present in Article 7.4.12, according to which:

> "Damages are to be assessed either in the currency in which the monetary obligation was expressed or in the currency in which the harm was suffered, whichever is more appropriate."

The UNIDROIT Principles may also be used in order to settle important issues of precontractual liability not covered in CISG. The relevant provisions of the UNIDROIT Principles are Articles 2.1.5 – which makes a party who negotiates, or breaks off negotiations in bad faith, liable for the losses caused to the other party – and 2.1.6 – which imposes upon the parties a duty of confidentiality with respect to

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[600] The principle of full compensation can be said to underlie generally the provisions of CISG on the buyer's remedies for breach of contract by the seller (Articles 45, 46 CISG) and the provisions dealing with the seller's remedies for breach by the buyer (Articles 61, 62 CISG). The principle of full compensation underlies more specifically the provisions dealing with the measure of damages for breach (Article 74 CISG including loss of profit, Article 75 CISG dealing with a contract/cover differential, Article 76 CISG dealing a contract/ market differential, Article 78 CISG declaring interest to be paid on any payment that is in arrears); the provisions dealing with the effect of avoidance (Article 81(2) CISG requiring restitution for goods already delivered or payments made, Article 84(1) CISG requiring the seller to refund price already paid plus interest, Article 84(2) CISG requiring the buyer to account for benefits derived from the goods) and the provisions relating to the preservation of goods (Articles 85 and 86 CISG entitling the seller and the buyer respectively to reimbursement for costs incurred and Article 88(3) CISG endorsing both parties' right to reimbursement for preserving and selling the goods).

[601] *See* Bonell (1996), *supra* note 598, at 33.

[602] There are already two arbitral awards rendered under the International Court of Arbitration of the Federal Chamber of Commerce in Vienna, which, following the same line of reasoning, expressly refer to the UNIDOIT Principles in determining the applicable rate of interest with respect to two sales contracts governed by CISG: *see* Schiedsspruche SCH 4318 and SCH 4366 of 15 June 1994: in *Recht der internationalen Wirtschaft* (1995) 590, note by P. Schlechtriem, *ibid.*, at 592.

confidential information given in the course of negotiations, irrespective of whether or not a contract is subsequently concluded. Both these provisions are expressions of the general duty placed upon each party in Article 1.7 of the UNIDROIT Principles:

> "... to act in accordance with good faith and fair dealing in international trade"

and which, at least in the opinion of some commentators, is also a general principle underlying CISG.[603]

The use of the UNIDROIT Principles as a means of interpreting international uniform law has already been recognised and exercised. Three awards – two rendered by the International Court of Arbitration of the Federal Chamber of Commerce of Vienna, [604] and one by the Court of Arbitration of the International Chamber of Commerce[605] – refer to the UNIDROIT Principles in order to fill a gap in CISG.

The first two cases related to disputes arising from contracts between an Austrian seller and a German buyer for the supply of steel. As CISG, which governed the two contracts, does not determine the rate of interest to be applied, the arbitrator filled this gap in accordance with Article 7(2) CISG. In view of the fact that one of the general principles underlying CISG is full compensation for the damage suffered, the arbitrator, in both cases, granted the average bank short-term lending rate applied with respect to the money of payment in the country of the creditor – as the payment had to be made there – and in support of this solution expressly referred to Article 7.4.9(2) of the UNIDROIT Principles.

The third case concerns a sales contract between an Austrian and a Swiss company. The contract was governed by CISG, and the sole arbitrator filled the gap to be found in CISG, as to the applicable rate of interest, by applying the annual London International Bank Offered Rate (LIBOR) plus 2%. In doing so, the arbitrator expressly referred to the rule laid down in Article 7.4.9(2) of the UNIDROIT

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[603] *See* Bonell (1987), *supra* note 113, at 84 *et seq.*

[604] Award No. 4318 and Award No. 4366 of 15 June 1994. See *Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft*, Wien, Schiedsspruche SCH 4318 and SCH 4366 of 15 June 1994 [for an English translation, *see* M.J.Bonell (ed.) *UNILEX. International Case Law & Bibliography on the UN Convention on Contracts for the International Sale of Goods*, (Transnational Publishers, Irvington, NY, Third release, 1997), E.1994-13 and E.1994-14]. For extracts of the original German version, *see Recht der internationalen Wirtschaft* (1995) 590 *et seq.*, with note by P. Schlechtriem, *ibid.*, at 592 *et seq.*; for a succint presentation in French, *see* I. Seidl-Hohenveldern in *Journal du Droit International* (1995) 1055-1056.

[605] *Cf.* ICC Award No. 8128 of 1995, an abstract of which has been published in *Journal du Droit International* (1996) 1024.

Principles – as well as to the same rule contained in Article 4.507(1) of the Principles of European Contract Law – which he defined as "one of the general principles according to Article 7(2) CISG".

(d) Working with CISG in an expanded role

A final, but definitely very important, use for the UNIDROIT Principles is to apply them to an international contract in conjunction with CISG. As noted earlier, the UNIDROIT Principles have a broader scope and a more comprehensive nature than CISG. The parties to a contract may well wish to apply them in addition to CISG for matters not covered therein. To effect this, a clause could be included in the contract which might read as follows:

> "This contract shall be governed by CISG, and with respect to matters not covered by this Convention, by the UNIDROIT Principles".[606]

There is a great difference between the role attributed to the UNIDROIT Principles under such a clause and the role that they may play under Article 7(2) CISG, as has been argued by the present writer in this thesis.

Under Article 7(2) CISG, the UNIDROIT Principles merely serve to fill in any *lacunae* to be found in CISG, *i.e.*, to provide a solution for questions "concerning matters governed by [CISG] which are not expressly settled in it" and with respect to which recourse to domestic law is permitted only as a last resort. By contrast, if the parties incorporated a clause in their contract which expressly allowed reference to the UNIDROIT Principles, the latter would apply to matters actually outside the scope of CISG and which otherwise would fall directly within the sphere of the applicable domestic law. This is very important development because it would go a long way towards achieving a more harmonious, if not unified, international commercial law of sales.

Nevertheless, a considerable amount of caution accompanies the above thoughts on the proposed expanded role of the UNIDROIT Principles, due to their special nature as a non-binding "Restatement". It should also be noted that the impact of such an incorporated reference is likely to vary according to whether a State court or an arbitral tribunal is called upon to interpret such a contract. State courts will tend to consider the parties' reference to the UNIDROIT Principles as a mere agreement to incorporate them into the contract and to determine the law governing the contract on

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[606] Suggested by Bonell, in Bonell (1996), *supra* note 598, at 36.

the basis of their own conflict-of-law rules.[607] As a result, they will apply the UNIDROIT Principles only to the extent that the latter do not affect the provisions of the proper law from which the parties may not derogate.[608]

The outcome could be different if the parties agree to submit the disputes arising from the contract to arbitration, since arbitrators are not necessarily bound to base their decision on a particular domestic law.[609] In arbitral proceedings, the UNIDROIT Principles may be applied not merely as terms incorporated into the contract, but as "rules of law" governing the contract together with CISG, irrespective of whether or not they are consistent with the particular domestic law otherwise applicable.[610]

There is a court decision, rendered by the Court of Appeal of Grenoble, which used the UNIDROIT Principles as a means to supplementing CISG.[611] The case concerns a sales contract between a German and a French company. In order to determine its own jurisdiction, in conformity with Article 5(1) of the Brussels Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters (1968), the court had to determine the place of performance of the seller's obligation to return part of the price unduly paid by the buyer. CISG, which governed the contract, is silent on this point. The court, while openly rejecting the opposite solution adopted by both French and German domestic law, decided in favour of the buyer's place of business. In doing so, it based the decision on the general principle that monetary obligations are to be performed at the obligee's place of business, which could be extracted not only from Article 57(1) CISG, but also from Article 6.1.6 of the UNIDROIT Principles.

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[607] For more on this point, *cf.* Bonell (1994), *supra* note 233, at 121-123.

[608] This may be the case, for instance, with the rules on contracting on the basis of standard terms (*cf.* Arts. 2.19, 2.22 of the UNIDROIT Principles), or on public permission requirements (*cf.* Arts. 6.1.14, 6.1.17). On the other hand, the rules relating to validity (*cf.* Chapter 3 of the Principles), or to the court's intervention in cases of hardship (*cf.* Article 6.2.3) will only be applied to the extent that they do not run counter to the corresponding provisions of the applicable domestic law.

[609] *See* Bonell (1994), *supra* note 233, at 123 *et seq.*

[610] Bonell (1996), *supra* note 598, at 38, notes that the only mandatory rules arbitrators may take into are those which claim to be applicable irrespective of the law otherwise governing the contract (*"loi d'application necessaire"*). The application of the mandatory rules in question, along with the UNIDROIT Principles, will not usually give rise to any true conflict, given their different subject matter. One of the few potential examples of such conflict may be when arbitrators have to decide between the law of the place of payment imposing the payment in local currency and the different solution provided for in the UNIDROIT Principles that otherwise governs the contract. *See* Bonell (1996), *supra* note 598, at 39, fn. 41.

[611] *Cour d'Appel de Grenoble,* Ch. com., 23 October 1996 (Scea Gaec Des Beauches Bernard Bruno c. Societé teso Ten Elsen GMBh & CokG), unpublished (*cf.* summary published in 1 *U.L.R.* (1997) 180).

An argument against the utilisation of the UNIDROIT Principles is that they do not support the goal of reducing unpredictability in trade,[612] and that the Principles indeed have the potential to increase the uncertainty surrounding a business transaction because several of their provisions "appear to depart from normal trading practices".[613] It has also been argued that arbitrators should not feel free to use the UNIDROIT Principles in conjunction with CISG unless the parties to the contract have explicitly agreed to them, because the Principles are not law and they often diverge from the equivalent provisions of CISG.[614]

However, the significant success encountered by both CISG and the UNIDROIT Principles, as evidenced by their warm reception by many different socio-political cultures, demonstrates that they each have their own *raison d'etre*. In addition, the valuable assistance that the UNIDROIT Principles can offer in clarifying the language of CISG and in settling matters governed but not expressly settled by CISG, highlights the fact that the two instruments can work together harmoniously. With respect to international commercial transactions different to sales contracts, there is virtually no risk of a clash between the two instruments, given the restricted scope of CISG. Even within the ambit of international contracts of sale, there is, at least at this point, no real competition between the UNIDROIT Principles and CISG. In view of the important function which the UNIDROIT Principles may fulfil side by side with CISG, in the expanded role outlined above, it is arguable that they not only do not threaten CISG's role or success, but indeed seem likely to enhance its effectiveness and practical value.

7. THE RULES OF PRIVATE INTERNATIONAL LAW

The first part of Article 7(2) CISG states that gaps in the Convention are to be filled in conformity with the Convention's general principles. After lengthy

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[612] R.Hill, "A Businessman's View of the UNIDROIT Principles", 13 *Journal of International Arbitration* (No.2, June 1996) 163.
[613] Hill, *ibid.*, at 169.
[614] *See, e.g.*, H.Raeschke-Kessler, "Should an Arbitrator in an International Arbitration Procedure apply the UNIDROIT Principles?", in Jean-Paul Beraudo *et al.*, eds., *UNIDROIT Principles for International Commercial Contracts: A New Lex Mercatoria?*, ICC Publication 490/1, (1995).

deliberations,[615] a rule was laid down in the second part of Article 7(2) CISG according to which, in the absence of general principles, gaps must be filled

> "... in conformity with the law applicable by virtue of the rules of private international law."

The first important conclusion that can be drawn from this provision is that it qualifies considerably the idea of CISG being an autonomous and self-contained body of rules, independent of and distinct from the different domestic laws.

This "subsidiary method"[616] of gap-filling, embedded in Article 7(2) CISG, found support under the 1964 Hague Conventions,[617] even though the prevalent opinion was to the contrary.[618] There was strong academic opinion in favour of the idea that, absent general principles of the Convention with which to fill the gaps, such gaps should be filled not by making recourse to the rules of private international law, but by resorting to the general principles of the law,[619] *i.e.*, to the so-called *allgemeine Rechtsgrundsatze*.[620] It has been argued, by exponents of this idea, that gap-filling in such instances should be performed by application of

> "principles and rules which are most commonly adopted within the different Contracting States and/or particularly suited for the case at hand."[621]

However, this approach based on "general principles of law" has received its own share of criticism. The main argument against such an approach is that the identification of such principles by interpreters trying to settle a particular dispute would be difficult, if not impossible, considering that not even specialists have been able to identify such principles despite prolonged deliberations during the preparation of the uniform law.[622] Moreover, the result would in any event be great uncertainty concerning the final decisions in each case.[623]

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[615] For an overview of the dispute which finally led to the solution adopted in CISG, *see* Schlechtriem (1981), *supra* note 551, at 23.
[616] This is the term used by Audit (1990), *supra* note 329, at 52.
[617] For an overview of the authors who supported the possibility of making recourse to the rules of private international law even under the Hague Conventions, *see* Herber (1990), *supra* note 537, at 93.
[618] For a similar conclusion, *see* Bonell (1987), *supra* note 113, at 82:"With respect to ULIS it was already questioned whether turning to domestic law should be permitted if a gap could not be filled by general principles which could be extracted from the uniform law itself. The prevailing view was opposed to this approach."
[619] For a recent discussion of the "general principles of law", *see* G.Alpa, "General Principles of Law", 1 *Ann. Surv. Int'l. & Comp. L.* (1994) 1.
[620] This is the expression used by Wahl (1976), *supra* note 507, at 139.
[621] Bonell (1987), *supra* note 113, at 82. Bonell, *ibid.*, also cites Wahl (1976), *supra* note 507, at 139 *et seq.*
[622] *See* J.Kropholler, "Der *'Ausschluss'* des IPR im Eiheitlichen UN-Kaufrecht", *Rabels Zeitschrift fur Auslandisches und Internationales Privatrecht* (1974) 380.
[623] *See* Kropholler, *ibid.*, at 380 *et seq.*

There is strong academic support for the view that in interpreting CISG, in the absence of general principles of the Convention – *i.e.*, as *ultima ratio*[624] – one is not only allowed to make recourse to the rules of private international law, but obliged to do so.[625] The present writer contends that although this conclusion is strictly valid, as Article 7(2) CISG refers to it, the search for relevant general principles should be expanded so as to avert recourse to the rules of private international law. It is part of this thesis that the grounds for such a rejection of the use of private international law rules are stronger than the reasons for their textual inclusion in the gap-filling mechanism of CISG. The inclusion of the provision in question was the result of an uneasy drafting compromise generated by political reasons. Its application for gap-filling purposes not only offers nothing to "the development of international trade on the basis of equality and mutual benefit,"[626] but it fosters the creation of divergent interpretations of CISG as well, thus endangering CISG's long-term success and survival.

A more conservative position on this issue is that recourse to the rules of private international law represents

> "... a last resort to be used only if and to the extent that a solution cannot be found either by analogical application of specific provisions or by the application of 'general principles' underlying the uniform law as such."[627]

An observation that can be made on this position is that lawyers from civil law systems can cope with such a structure, since they are accustomed to the idea that every attempt must be made to find a solution within the code itself before turning to an external source to fill in a gap of a code. However, courts in countries without this tradition may have to try hard to grasp the fact that every effort to fill a gap must first be made on the basis of the other criteria in Article 7(2) CISG, before turning to domestic law via the rules of private international law.[628]

The domestic law "applicable by virtue of the rules of private international law", will be the law which would have governed the contract in the absence of CISG, or some other law referred to by the competent conflict of law rules. Stern warnings have

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[624] For a similar evaluation, *see* M.J.Bonell, "Article 7", in *Convezione di Vienna sui Contratti di Vendita Internazionale di Beni Mobili* (Cesare Massimo Bianca ed., 1991) at 25; Herber (1990), *supra* note 537, at 93.

[625] For a similar conclusion, *see* Ferrari (1994), *supra* note 39, at 228. Bonell (1987), *supra* note 113, at 83, states that the "recourse to domestic law for the purpose of filling gaps under certain circumstances is not only admissible, but even obligatory."

[626] Preamble to CISG.

[627] Bonell (1987), *supra* note 113, at 83.

been issued against the danger of an abuse of the recourse to the rules of private international law during gap-filling in CISG, since the gaps can too easily be filled by virtue of the rules of private international law. As one commentator has noted:

> "... it is enough to state that no general principles can be found and therefore the only way out is to resort to private international law." [629]

It is the opinion of the present writer that CISG is, and must remain, a self-contained body of rules independent of, and distinct from, the different domestic laws. The nature of the effort that created CISG demands that CISG stand on its own feet, or it will not stand at all. Due to its unique nature and limitations, it is necessary that CISG exist on top of a legal order that can provide doctrinal support and solutions to practical problems – such as gap-filling – in order to guarantee CISG's functional continuity and development without offending its values of internationality and uniformity. The necessary legal backdrop for CISG's existence and application can be provided by general principles of international commercial law, such as those exemplified by the UNIDROIT Principles.

The recourse to rules of private international law represents regression into doctrinal fragmentation and practical uncertainty. The relevant reference to such a method in Article 7(2) CISG is unfortunate and should remain inactive, since its activation would reverse the progress achieved by the world wide adoption of CISG as a uniform body of international sales law.

The UNIDROIT Principles and CISG both belong to the "new international order"[630] that the U.N. has envisaged and working in tandem they best reflect the objectives of that body to remove "legal barriers in international trade and promote the development of international trade".[631]

8. A GAP-FILLING EXERCISE

The inability of any statute to address and solve all circumstances and problems that arise under its provisions is well recognised.[632] Bearing in mind the enormity of the task undertaken by the drafters of CISG to unify international law for the sale of

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[628] *See* Bonell, *ibid.*
[629] Eorsi (1984), *supra* note 221, at 2-12.
[630] *See* the discussion in "The New Lex Mercatoria", Ch. 1 of this work, *supra*.
[631] *Ibid.*
[632] *See* Honnold (1991), *supra* note 53, at 97.

goods, the complexity and duration of the consensus-style drafting process[633] and the difficulty of revising an international Convention,[634] it is inevitable that gaps will be identified in CISG.[635]

In this section, the present writer examines what he believes to be a gap in Article 16 CISG. In dealing with the suggested gap, the gap-filling procedure set out in Article 7(2) CISG is analysed, accompanied by a practical demonstration of its function, in order to evaluate its success, or failure, in maintaining and promoting the goal of CISG – *i.e.*, uniformity in interpretation and application of the Convention.

(a) Article 16 CISG

Article 16 CISG sets out the law in relation to revocability of offers. It provides that:

> "(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.
>
> (2) However, an offer can not be revoked:
>
> (a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or
>
> (b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer."

According to the discussion contained in the previous chapter dealing with Article 7(1) CISG, in interpreting CISG one should always study the legislative history of the articles of CISG in order to understand better their nature, scope and function.[636] An examination of its legislative history reveals that Article 16 CISG was one of the most controversial articles discussed by the Convention's drafters in the 11-year period that elapsed between the establishment of the Working Group and the approval of the Convention at the Diplomatic Conference in 1980.[637] Article 16

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[633] *See* Honnold, *ibid.*, at 49-56; B.Nicholas, "The Vienna Convention on International Sales Law" 105 *L.Q. Rev.* (1989) 201, at 243.

[634] *See* Honnold (1991), *supra* note 53, at 151.

[635] *See* Eorsi (1984), *supra* note 221, at 2-11. Eorsi suggests that a gap may exist in Arts. 78 and 84 CISG, which provide for the payment of interest by an infringing party, but do not specify the appropriate rate. He also considers that a gap may exist under Article 1(b), "if one of the parties to a contract has a place of business in State A which has ratified the Convention and another in State B which has not ratified it", *ibid.*

[636] As with any question involving interpretation of the Convention, it is both useful and advisable to look to the legislative history for assistance, *see* Honnold (1991), *supra* note 53, at 138-142; Bonell (1987), *supra* note 79, at 20. Recourse to the legislative history of an international treaty for guidance when interpreting its provisions has been recognised as appropriate by both cil law and common law courts. For the U.S. position, *see* Air France v. Saks, 470 U.S. 392, at 396 (1985). For the position in the U.K., *see* Fothergill v. Monarch Airlines [1981] A.C. 251. It would appear likely that Australian courts would follow the Fothergill case; *see* Acts Interpretation Act 1901 (C'th), s.15AB.

[637] For an examination of the legislative history of Article16 CISG, *see* Honnold (1989), *supra* note 89; Honnold (1991), *supra* note 53, at 205-214; G.Eorsi, "Articles 14, 15, 16, 17, 55 CISG", in

CISG owed most of its controversy to the apparent lack of agreement among the drafters as to how the article was meant to be interpreted,[638] although it was meant to lay down the uniform international sales law on the issue of revocability of offers. On this preliminary point to the gap question, it is evident that there is a considerable risk that the provision in question could be interpreted differently, depending on whether a civil law or common law tribunal is hearing the matter.[639] Clearly this is a serious threat to CISG's objective of achieving uniformity in interpretation and application. However, the main issue here is the threat to a uniform law of international sale of goods due to the failure to adopt a common approach to gap-filling in CISG.

Article 16 CISG appears to contain a gap in the situation where an irrevocable offer has clearly been made. Professor Honnold has specified the existence of the gap in the following situation:

> "Buyer offered to purchase complex machinery from Seller which Seller would manufacture according to designs supplied by Buyer. The offer included a stated price and stated that the offer would be open for two months to enable Seller to determine whether he could make the machinery at that price. Seller immediately started the process of designing manufacturing procedures and computing costs of production. Two weeks later, when Seller had spent substantial sums in computing costs but had not completed this work, Buyer notified Seller that he could no longer use the machinery and withdrew the offer. Seller thereupon stopped work on the cost estimates since it would be uneconomical to invest further funds in preparing to make machinery that Buyer would not accept and perhaps could not pay for."[640]

In the above hypothetical situation suggested by Honnold, S has relied on B's irrevocable offer for the creation of an international contract for the purchase of goods and incurred considerable expense to determine whether it can accept B's offer. When B notified S that the offer was being withdrawn, S had not yet reached the point where it would be able to accept the offer, since it had not yet completed the process of calculating the costs of production of the relevant goods. The issue

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Commentary on the International Sales Law: The 1980 Vienna Convention (C.M. Bianca and M.J. Bonell eds., Milan: Giuffrè 1987) 132, at 150-155.

[638] *See* Eorsi, *supra* note 637, at 158.

[639] *See* Eorsi, *ibid.*, at 155; K.Sono, "Restoration of the Rule of Reason in Contract Formation: Has There Been Civil and Common Law Disparity?" 21 *Cornell Int'l. L.J.* (1988) 478. The position in the U.S.A. is set out in § 2-205 of the U.C.C., which, while adopting the civil law approach, limits its application to signed written offers made by merchants.

[640] Honnold (1991), *supra* note 53, at 213.

that has to be resolved is whether, under CISG's provisions, S could recover the expenditure incurred in reliance on B's initial offer.[641]

The remedial provisions of CISG provide that damages for a loss suffered by one party may be obtained when the other party has committed a "breach of contract".[642] However, since S has not accepted the irrevocable offer of B, Article 23 CISG would suggest that a contract had not been concluded between B and S. Where there is no "concluded contract" there can be no "breach of contract", since there is no contract that can be breached. It follows that Article 74 CISG can not operate and that, consequently, damages will not be available to the Seller. In this situation, the inability of the S to recover damages suggests that there is a gap in CISG, since CISG intended to provide parties with effective remedies.[643]

(b) Identifying the gap in Article 16 CISG

The gap-filling mechanism of CISG is laid down in Article 7(2) CISG. Procedurally, there is a specific method of analysis when considering whether there is a gap in the provisions of CISG. Before the gap-filling rule in Article 7(2) CISG can be put into operation, the matters to which the rule applies must first be identified.

The starting point is the observation that the gaps to which the rule refers are gaps "*praeter legem*", *i.e.*, issues to which CISG applies, but which it does not expressly resolve. The first condition for the existence of a gap in the sense of Article 7(2) CISG is that the issue concerns matters "governed by the Convention". Specifically, Article 7(2) CISG requires the determination of two questions:

(1) Is the matter governed by the CISG?[644]

If the answer to this initial question is negative, then the gap-filling mechanism can not be put into operation, since a gap can only exist in relation to matters that are

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[641] For a similar analysis of Professor Honnold's hypothetical problem case, *see* Rosenberg (1992), *supra* note 493, at 445 *et. seq.*

[642] *See* Article 74 CISG.

[643] Rosenberg explores an alternative argument that a contract between the Seller and the Buyer has come into existence based on the argument that the promise by the Buyer not to revoke its offer had been accepted by the Seller's conduct; *see* Rosenberg, *ibid.*, at 446, fn.19. However, the same author goes on to doubt whether courts would be prepared to accept the existence of a contract on this basis and cites in support of such a conclusion K.Zweigert and H.Kotz, *Introduction to Comparative Law* (1987), Vol. II, p.40: "...it is a sheer fiction to say that the parties have made a special preliminary contract to the effect that the offer should remain open".

[644] However, there may be many instances where after examining a provision of CISG and having "regard to its international character and the need for uniformity in its application" (Article 7(1) CISG), the answer to this question may not be very clear.

governed by the Convention.[645] On the other hand, a positive answer to the initial question allows the inquiry to proceed to the next question.

(2) If the matter is governed by CISG, is it expressly settled under it?

If the answer to this second question is positive, then the gap-filling mechanism can not be put into operation either, since a gap can not exist if CISG deals with the matter. It is generally accepted that a matter will be expressly settled by CISG:

> "... if it could be said that the drafters intended the provisions of the Convention to be the exclusive and comprehensive law in relation to the matter".[646]

Where such an intention is evident there cannot be a gap. If the answer to the second question is negative, it must be concluded that there is a gap in CISG and according to Article 7(2) CISG it must be settled: (a) in conformity with the general principles on which CISG is based, or (b) in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

The theoretical framework of gap-filling having been established, it can be put into practice for the problem at hand.

- *Is the Matter of Revocation of Offers Governed by the CISG?*

It is not clear whether CISG is concerned with precontractual negotiations in situations where an irrevocable offer has not been made. While there is no express provision governing precontractual negotiations generally, [647] a principle that underlies CISG is that the Convention is indeed concerned with precontractual negotiations where a party has acted in reliance on a representation made by the other.[648] Article 16(2) CISG protects a party who has "acted in reliance" on an offer in the reasonable belief that it was irrevocable, while Article 29(2) CISG provides that a party may be precluded by its conduct from asserting that a modification to a

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[645] However, where a matter is not governed by CISG recourse may be had to the applicable domestic law. *See* Schlechtriem (1986), *supra* note 359, at 57; Honnold (1991), *supra* note 53, at 213; Bonell (1987), *supra* note 113, at 75.

[646] *See, e.g.*, Rosenberg (1992), *supra* note 493, at 448.

[647] The legislative history of CISG reveals that its drafters rejected a proposal by the former German Democratic Republic to introduce a provision which would have created a general liability for precontractual negotiations: A/Conf.97/C.1/L.95. According to Professor Schlechtriem, what follows from this rejection is that damages caused by one party to the other in the course of precontractual negotiations remain subject to regulation by domestic law applicable to conflict rules, unless the case concerns the revocation of an offer which is a matter regulated by CISG; *see* Schlechtriem (1986), *supra* note 359, at 57.

[648] *See* Honnold (1991), *supra* note 53, at 14.

contract must be in writing "to the extent that the other party has relied on that conduct".[649]

From the above it can be concluded that CISG governs revocation of offers. Article 16 CISG was intended to govern the field as to when an offer can, or cannot, be revoked. This is plain from the express language of the provision, its legislative history and the academic opinion on point.[650]

- *Is the Matter of Revocation of Offers "Expressly Settled" by CISG?*

It appears that CISG allows an offeree to recover damages if it has accepted an irrevocable offer that is unlawfully withdrawn, but does not allow damages in the absence of acceptance.[651] The crucial question, for our purposes, is whether the drafters of CISG intended not to provide damages in the absence of acceptance – in which case there would be no gap in CISG – or whether there is a gap in the remedial provisions of CISG. The gap-filling procedure can only take place if one concludes that the absence of the remedy resulted from the failure of the drafters of CISG to foresee the situation and resolve it.[652]

In order to determine whether the absence of remedial provision for the specific case is a gap or, alternatively, was intended by the drafters, one must examine the legislative history of the provision, similar cases regulated by specific provisions of CISG and the principles which underlie CISG.[653]

(i) Examination of the legislative history of the provision

The examination of the legislative history of the provision takes place in order to investigate whether the drafting debates reveal an express intention that no remedy be available in the particular case, or whether the absence of the remedy resulted from the failure of the drafters to foresee the situation and resolve it.

Upon examination of the legislative history of Article 16 CISG and Article 74 CISG, there is no evidence to suggest that the hypothetical case posed by Honnold had been envisaged by the drafters, nor that they had intended that damages ought not to be available to S.

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[649] Honnold, *ibid.*, at 154.

[650] *See* Honnold, *ibid.*, at 214: "The Convention - and only the Convention - controls whether the revocation of the offer is rightful". Revocation of an offer "is a matter governed by the Convention" also according to Schlechtriem (1986), *supra* note 359, at 57, fn.26. Also *see* P. Schlechtriem, "The Borderland Between Tort and Contract - Opening a New Frontier", 21 *Cornell Int'l L.J.* (1988) 467, at 475.

[651] *See* earlier discussion of this point with references to Arts. 74 and 23 CISG, in this chapter, *supra*.

[652] *See*, *e.g.*, Honnold (1991), *supra* note 53, at 156.

[653] For support for such methodology, *see* Rosenberg (1992), *supra* note 493, at 448-449.

(ii) Examination of similar cases regulated by CISG provisions

Examining similar cases regulated by specific provisions of CISG can assist in considering whether they can be of any assistance.[654] If it appears that no remedy is provided under CISG for the particular case, but that a remedy is available in analogous situations, it will usually be reasonable to conclude that a gap exists.[655] Alternatively, if a remedy is not available in analogous situations either, it will be reasonable to conclude that that the drafters of CISG did not intend it to be available in the case in question.

To perform such an examination of other cases governed by Article 16 CISG, we can change the facts in Professor Honnold's hypothetical to create slightly different questions to the ones at hand in order to see how Article 16 CISG deals with them.[656]

Variation A* - *Seller accepts the offer prior to its withdrawal by the Buyer

Suppose that S carried out all its research and notified B that it had accepted the offer prior to its withdrawal by B. B subsequently informs S that it can no longer use the machinery and will not go through with the sale. In this variation of the facts, could S recover damages from B for the expenditure incurred in reliance of the offer?

Solution A

This is a clear case where the offer cannot be withdrawn; thus B has repudiated. However, it is important for the complete treatment of our case problem to analyse the mechanics of the solution to *Variation A*.

According to Article 18 CISG

> "(1) An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. ..."

Therefore, the communication by S to B of its acceptance becomes effective at the moment that it reaches the offeror, *i.e.*, prior to the withdrawal of the offer. Under Article 23 CISG, a contract is concluded at that time.

Upon conclusion of a valid contract, B takes on certain obligations that are stated in Chapter III of the CISG. Article 53 CISG provides that:

> "The buyer must pay the price for the goods and take delivery of them as required by the Contract and the Convention." (emphasis added)

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[654] *See* Honnold (1991), *supra* note 53, at 155-6.

[655] However, provision for a remedy in an analogous situation may not have been intended to extend to cases other than those specifically dealt with by that provision. *See* Bonell (1987), *supra* note 113, at 78; Honnold (1991), *supra* note 53, at 156.

[656] A similar operation is carried out by Rosenberg (1992), *supra* note 493, at 453-6.

Faced with B's subsequent withdrawal of the offer, S must look at the remedies that are available under the provisions of CISG.

(i) avoidance of the contract

Under Article 72(1) CISG, S may declare the contract avoided

> "[i]f prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract ..." (emphasis added).

The facts in *Variation A* are an example of anticipatory breach. According to Article 25 CISG:

> "A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract..."

B's stated intention that it will not go through with the contract and will not pay the contract price clearly constitute a "fundamental breach", under Art. 25 CISG, for the purposes of the case in *Variation A*. Article 72(2) CISG requires that

> "... the party intending to declare the contract avoided (the Seller) must give reasonable notice to the other party (the Buyer) that it intends to avoid the contract to permit him to provide adequate assurance of his performance."

In a case like *Variation A*, where B declares that it will not perform its obligation to pay, S would be able to avoid the contract for anticipatory breach of contract, without any major difficulty.

(ii) damages

In addition to avoiding the contract under Article 72 CISG, S can exercise its right to claim damages under CISG, pursuant to Article 61 and 74 CISG. Article 61 CISG directs that:

> "(1) If the buyer fails to perform any of his obligations under the contract or this Convention, the seller may:
>
> (a) ...
>
> (b) claim damages as provided in Articles 74 and 77."

According to Article 74:

> "Damages for breach of contract by one party consists of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. ..."

Article 74 CISG provides the general rule for a calculation of damages for losses suffered by the buyer, or seller, as a result of a breach and seeks to place the injured party in the position it would have been had the other party properly performed the

contract.[657] Article 74 CISG provides both an objective and subjective test for foreseeability. The consequence of the breach need only be *possible*[658] and the consequences of the breach need only be contemplated by the breaching party. It follows that S would be able to recover the costs it incurred in reliance on B's offer.

Variation B *- Buyer withdraws the offer prior to Seller's notification of acceptance*

In this variation of Professor Honnold's hypothetical case problem, lets suppose that B informs S that it is withdrawing its offer before S has notified B of its acceptance and before the initial period within which it was stated that the offer would remain open has expired. Could S recover damages for the expenditure incurred in reliance on the offer, if it ignored B's notice and notified B that it accepted the offer?

Solution B

According to Article 16 CISG:

> "(2) ... an offer can not be revoked:
>
> (a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or
>
> (b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer."

Applying the wording of the above provision to the facts of *Variation B*, it can be seen that that the offer can not be revoked prior to the expiration of the two month period during which it was represented that it would be held open. Therefore, it appears that, for the purposes of CISG, B's revocation of the offer in *Variation B* would have no legal effect. Consequently, since S notified B that it has accepted the offer which was to remain open, the preceding analysis on the breach of contract in *Variation A* would also apply in *Variation B*. The result would also be the same.

Professor Honnold's hypothetical and Variations A & B

From the above analysis of S's remedies in *Variations A* and *B*, it can be seen that CISG makes provision for the recovery of damages by S for the expenditure incurred in reliance on B's offer. *Variations A* and *B* are clearly analogous to Honnold's hypothetical Problem Case. The factual similarities of the three cases centre on the point that in all three cases S has relied on B's irrevocable offer and suffered a loss of expenditure in reliance on the offer. The factual variations between the three cases

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[657] *See* Murphey (1989), *supra* note 736, at 420.
[658] *See* Murphey, *ibid.*, at 439-40.

are based on the distinction that in *Variations A* and *B*, but not in Professor Honnold's hypothetical, S has:

(i) completed its research of designing and manufacturing procedures and computing costs of production and decided to accept the offer within the two month period within which the offer was to remain open; and

(ii) notified B that it accepts the offer before the expiration of the relevant period.

Answering the question of whether, or not, a gap in CISG exists in relation to revocability of offers, depends on the answer to the following question: Do the factual differences in the three cases outlined above lead to the conclusion that damages were not intended to be available in Professor Honnold's hypothetical Problem Case?

Argument that there is no gap in Article 16 CISG

The argument that there is no gap in Article 16 CISG would have to be based on the conclusion that the differences between *Variation B* and Professor Honnold's hypothetical lead to the conclusion that damages were not intended to apply to the latter case. This conclusion could be supported on the premise that before CISG's remedial provisions are brought into effect there must be an acceptance of an offer, so as to create a contract that can be governed by CISG.

If this argument were valid, it would mean that Article 16 CISG was intended to enable a party relying on an irrevocable offer to accept the offer and recover damages if the other party failed to perform its obligations. A natural conclusion then would be that Article 16 CISG was not intended to operate to enable a party to recover damages if it did not accept the offer, as in such circumstances there would be no contract. Thus, it would follow that, as there was no acceptance in the Problem Case, there is no remedy and, consequently, no gap.

Argument that a gap exists in Article 16 CISG

The above argument that no gap exists in the CISG on the specific point of contention seems to be defective. The main criticism is that it creates an absurdity by supporting that CISG makes provision for the recovery of damages by the Seller in *Variation B* but not in Professor Honnold's hypothetical Problem Case.[659] The charge of inanity attributed to this argument is supported by the fact that on such an interpretation of CISG's provisions, S not entitled to damages in Professor

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[659] For a similar conclusion, *see* Rosenberg (1992), *supra* note 493, at 455.

Honnold's hypothetical may become entitled to damages by incurring additional expenditure (which it would subsequently recover if it can establish a breach) and notifying B (within the relevant period that the offer was to remain open) that the offer was accepted. However, to conduct itself in this manner, in order to be allowed to recover damages, S would have to act in defiance of, and direct opposition to, one of the expressly stated general principles of CISG, the principle of mitigation, as this is expressed in Article 77 CISG:

> "A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss of profit, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated."

It is safer to conclude that the drafters of CISG did not intend to force a party to act in an exaggerated and economically inefficient manner, by incurring additional loss, in order to qualify for a remedy. This conclusion can be supported further by an observation of Article 61(1) CISG,[660] which provides that damages will be available to the seller:

> "[i]f the buyer fails to perform *any of his obligations* under the contract *or this Convention...*" (emphasis added).

Relying on the wording of this provision, it can be argued that the drafters in fact intended that CISG's remedial provisions be available in cases where, while there is no breach of contract, there was a failure to perform an obligation created under CISG. This argument, if accepted, would mean the existence of a "general principle" to that effect, which could be used to fill the relevant gap.

From the above analysis, it would follow that damages were intended to be available in Honnold's hypothetical Problem Case, given that the Seller has suffered a loss as a consequence of the Buyer's breach of its obligation (as stated in Article 16(2) CISG) to hold the offer open. The absence of a specific legislative intent to exclude the remedy, the availability of the remedy in closely analogous situations, the conflict with the principle of mitigation, and the provision of Article 61 CISG, compel the conclusion that the drafters simply failed to foresee the Problem Case arising. In other words, the matter has not been expressly settled and a gap exists in Article 16 CISG.

(iii) Examination of the principles that underlie CISG

An examination of the principles that underlie CISG is necessary to clarify the drafter's intentions. It has been correctly noted that

> "... if the availability of the remedy conflicts with any of the principles which underlie the provisions of the Convention, it is unlikely that a gap exists. Conversely, if the absence of a remedy conflicts with any of the Convention's general principles, it is likely that a gap exists".[661]

From the above analysis of the case in favour of the existence of a gap, it can be seen that there is a strong argument for CISG's remedial provisions to be available in cases where, while there is no breach of contract, there was a failure to perform an obligation created under CISG.

While CISG's damages provisions are written in terms of providing remedies for breach of contract, those provisions must be read in light of Article 61 CISG. There is a strong argument that the principle underlying Article 74 CISG is that damages should be available for both a breach of contract and a breach of obligation under CISG. If this argument is correct, parties may be exposed to actions for damages in a variety of situations where obligations are created by the Convention.[662]

The fact that Section III of CISG is headed "Remedies for Breach of Contract by the Buyer" should not overshadow the fact that headings ought not to be given greater weight than the provisions themselves.

- *Conclusion on the existence of a gap in Article 16 CISG*

The present writer, having examined

(i) the legislative history of the provision in question (Article 16 CISG),

(ii) similar cases regulated by specific provisions of CISG (to consider whether they can be of any assistance), and

(iii) the principles that underlie CISG (to clarify the drafter's intention),

is of the opinion that the matter of revocation of offers is governed by CISG but is not expressly settled in it, *i.e.*, a gap does exist in Article 16 CISG.

(c) Application of the gap-filling analysis to Article 16 CISG

Once it has been concluded that a gap exists in a CISG provision, it is necessary to determine how it should be filled. As explained earlier in this chapter, Article 7(2) CISG provides two alternative methods to perform the gap-filling operation. The gap

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[660] It is arguable that a principle of "avoiding waste" is embodied in Article 61 CISG.

[661] *See* Rosenberg (1992), *supra* note 493, at 449. .

[662] *See* Rosenberg, *ibid.*, at 456, fn.68, where the author provides a list of several obligations of the buyer and the seller (*e.g.*, Arts. 60(a), 21(2), 32(1), 32(2), 48(2), 29(2) CISG) and states that failure to perform any of them might give rise to actions for damages by the other party.

is filled either by applying the general principles on which CISG is based, or, in the absence of applicable principles, by recourse to domestic law *via* the rules of private international law. Of course, in considering these alternatives, regard must be had to CISG's international character and the need to promote uniformity in its application.[663]

It is submitted that in Professor Honnold's hypothetical Problem Case, the gap can and should be filled by applying the general principle underlying Article 74 CISG, that damages are available to an innocent party where the other party has breached its obligation under the contract or CISG. This result flows from the argument outlined earlier in this chapter, according to which the Seller can exercise its right to claim damages under CISG pursuant to Articles 61 and 74 CISG. Article 61 CISG directs that:

> "(1) If the buyer fails to perform any of his obligations under the contract or this Convention, the seller may:
>
> (a) ...
>
> (b) claim damages as provided in Articles 74 and 77."

According to Article 74 CISG:

> "Damages for breach of contract by one party consists of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. ..."

Following what is stated in Article 74 CISG, the Seller would be able to recover the costs it incurred in reliance on the offer, as well as damages for any reasonably foreseeable loss of profit that flowed from the breach of contract by the Buyer.[664] Honnold's hypothetical Problem and *Variation B* were found to be analogous: In both cases:

(i) an irrevocable offer was made,

(ii) S reasonably relied on the offer and incurred considerable expenditure to determine whether to accept the offer,

(iii) B unlawfully withdrew the offer, with the result that S's reliance expenditure is wasted.

The similarity of the two cases is so great that the Seller in the Problem Case can, by its unilateral action, place itself in the same situation as S in *Variation B* and obtain

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[663] *See* Article 7(1) CISG.

[664] *See* earlier discussion on Art. 74, in this section, *supra*, at 188-9.

damages under Article 74 CISG. The similarity between the two cases, together with the effect of Article 61 CISG, which makes provision for the recovery of damages where a buyer breaches its obligation under CISG, leads to the conclusion that damages should available to the Seller in the hypothetical Problem Case. The drafters "would not have deliberately chosen discordant results" for the two cases.[665] Consequently, it is submitted that Article 7(2) CISG requires that the gap in Article 16 CISG be filled by applying the principle underlying Article 74 CISG.

However, should a tribunal, nevertheless, decide that there was no general principle under CISG that could be applied to fill the gap, recourse would be had to the domestic law applicable by virtue of the rules of private international law. It is part of the present writer's thesis that recourse to the rules of private international law should not be made, despite the provision to the contrary in Article 7(2) CISG, because this would destabilise the unifying effort that CISG represents. An examination of certain domestic legal systems in relation to this point supports this thesis.

As the law stands in certain civil law states, the Seller is likely to be allowed to recover reliance damages. In Italy, the *Codice Civile* would allow the Seller to recover damages for the loss suffered in preparing to perform.[666] Similarly, in Germany, Brazil, Greece and Switzerland, an offeror

> "... is not simply under a duty not to withdraw the offer but actually has no power to do so ... an attempted withdrawal simply has no legal effect at all".[667]

In France, while an offer stated to be open for a set period can be withdrawn by the offeror before the expiry of that period, the law provides that such a withdrawal will render the offeror liable to the offeree in damages.[668] Although there is some dispute in French law as to the legal basis for the offeror's liability in damages, it seems likely that the Seller in the hypothetical Problem Case could obtain damages equivalent to the expenses it incurred in reliance on the Buyer's offer remaining open.[669]

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[665] Honnold (1991), *supra* note 53, at 156.
[666] *See* Zweigert and Kotz (1987), *supra* note 643, at 41.
[667] *Ibid.*
[668] *See* Zweigert *et al*, *ibid.*, at 39, where the authors cite Civ. 10 May 1968, Bull. civ. 1968 III, 162.
[669] *See* Zweigert and Kotz, *ibid.*, at 40. Also *see* F.Kessler and E.Fine, "Culpa in Contrahendo, Bargaining in Good Faith and Freedom of Contract: A Comparative Study" 77 *Harv. L. Rev.* (1964) 401; Eorsi (1987), *supra* note 637, at 155.

Courts in some common law countries are also likely to allow the Seller damages, under the doctrines of equitable or promissory estoppel. In the United States, the Uniform Commercial Code Article 2-205 would be of no assistance in the Problem Case, as the offer is not in writing. However, U.C.C. Article 1-103 provides that, unless displaced by particular provisions of the Act, the principles of law and equity, including estoppel, shall supplement the provisions of the Act. United States courts have consistently shown a willingness to apply the principles of promissory estoppel to enable plaintiffs to recover reliance damages in cases where UCC Article 2-205 does not apply.[670] The law of promissory estoppel in the United States is derived from s. 90 of the Restatement (Second) of Contracts, which states:

> "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires."[671]

Consequently, it is likely that the Seller in the Problem Case would recover reliance damages if United States domestic law applied.

The Australian High Court, in the case of Waltons Stores (Interstate) Ltd. v. Maher,[672] endorsed the use of equitable estoppel as a cause of action. The law stands as it was pronounced by the Supreme Court of New South Wales in the following terms:

> "For equitable estoppel to operate ... there must be the creation or encouragement by the defendant in the plaintiff of an assumption that a contract will come into existence or a promise be performed, and the reliance on that by the plaintiff, in circumstances where the departure from the assumption by the defendant would be unconscionable."[673]

Thus, it is likely that an Australian court would also uphold an action by the Seller in the Problem Case, this time on the basis of equitable estoppel. The remedy granted to

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[670] *See, e.g.*, E.A.Coronis Associates v. M. Gordon Construction Co. 90 N.J. Super. 69, 216 A. 2nd 246 (1966), Harry Harris v. Quality Constr. Co. 598 S.W. 2nd 872 at 874 (Ky. App. 1979). *See* also, Farnsworth (1987), *supra* note 363, at 236-239.

[671] For an examination of U.S. developments under s.90, *see* P.Gibson, "Promissory Estoppel, Article 2 of the UCC and the Restatement (Third) of Contracts", 73 *Iowa L.Rev.* (1988) 659; D.Farber and J. Matheson, "Beyond Promissory Estoppel: Contract Law and the Invesible Handshake" 52 *U. Chi. L. Rev.* 903; and C. Knapp, "Reliance in the Revised Restatement: The Proliferation of Promissory Estoppel", 81 *Colum. L.Rev.* (1981) 52.

[672] (1988) 164 C.L.R. 387 at 406, 416.

[673] Silovi Pty. Ltd. v. Barbaro (1988) 13 NSWLR 466 at 472. *See* also, A.Leopold, "Estoppel: A Practical Appraisal of Recent Developments", 7 *Aust. Bar Rev.* (1991) 47; P.Parkinson, "Equitable Estoppel: Developments after Waltons Stores (Interstate) v. Maher", 3 *J. Cont. L.* (1990) 50.

satisfy the equity will be whatever is necessary to prevent detriment resulting from the unconscionable conduct.[674]

However, English courts, unlike their Australian counterparts, would probably not allow the Seller to recover damages because the use of the doctrine of promissory estoppel in England is still limited to providing the equitable defence to an action, rather than giving rise to a cause of action.[675] It follows that the Seller in the Problem Case would be unable to recover reliance damages in England.

The above analysis reveals that while most domestic law systems will enable the Seller in the hypothetical Problem Case to institute proceedings to recover damages for its reliance loss, this will not always be the case. As a result, if the gap in Article 16 CISG is filled by recourse to domestic laws applicable by virtue of the rules of private international law, non-uniform results may follow.

Therefore, it is submitted that the provision in Article 7(2) CISG for recourse to domestic solutions, even as a last resort, should not be activated, as its activation will produce divergent results in CISG's interpretation and application.

9. CONCLUSIONS

The benefits of a uniform law for the international sale of goods are substantial. A uniform law would provide parties with greater certainty as to their potential rights and obligations. This is to be compared with the results brought about by the amorphous principles of private international law and the possible application of an unfamiliar system of foreign domestic law.

Another advantage of a uniform law of international sales of goods is that it would serve to simplify international sales transactions and thus "contribute to the removal of legal barriers in international trade and promote the development of international trade".[676] CISG seeks to achieve such uniformity. Whether or not it is successful will largely depend on two things: first, whether domestic tribunals interpret its provisions in a uniform manner and, secondly, whether those same tribunals adopt a uniform approach to the filling of gaps.

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[674] *See* Waltons Stores (Interstate) v. Maher (1988) 164 CLR 387, at 405, 419. 423.
[675] *See* Crabb v. Arun Dist. Council [1976] Ch. 179, at 187. 188.
[676] *See* Preamble to the CISG.

From what has been said so far, one main conclusion can be drawn: ultimately, it is the interpreter's task to decide whether the 1980 Uniform Sales law is really a uniform law, *i.e.*, whether universalism prevails over nationalism and whether any progress has been made since the enactment of the national codes that overturned what could have been a basis for a new *ius commune*. Unlike the 1964 Hague Conventions, the 1980 Vienna Convention provides an ideal framework that should permit a positive answer to the foregoing question.

A survey of a number of common law and civil law domestic legal systems reveals that if recourse were had to domestic law to fill in the gap, non-uniform results will follow. This demonstrates that such recourse undermines the purpose of CISG. It follows that for the proper construction and application of CISG, domestic tribunals should comply with the mandate in Article 7(1) CISG for internationality and uniformity and avoid recourse to domestic law, despite the relevant provision in Article 7(2) CISG. It is asserted throughout this chapter that the UNIDROIT Principles can and should assist in the elimination of the need to resort to rules of private international law for gap-filling, in order to maintain the integrity of CISG's uniform and international application and interpretation.

The UNIDROIT Principles, being the result of the work of a group of experts acting under the auspices of an inter-governmental organisation with no legislative power, may have appeared to a sceptical observer, at first sight, to be little more than an academic exercise of no practical utility.[677] However, the experience gained by their use and usefulness since their publication has shown that this is not the case. Their success in practice has gone beyond all expectations.[678] The reception of the UNIDROIT Principles in academic and professional circles has been very warm and wide spread, as they have been used as teaching materials, as a model for national and international legislation, as a guide in contract negotiations, as the law chosen by the parties to govern their contract, and as rules of law referred to in judicial proceedings. As pointed out by an eminent Swiss arbitrator:

> "[t]he UNIDROIT Principles, are likely to find a quite universal acceptance, since they have been worked out ... with the contribution of over seventy well known specialists from all major areas and legal systems of the world,

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[677] For such a view, *see* Hill (1996), *supra* note 612.
[678] *See*, *e.g.*, Bonell (1997), *supra* note 562.

> including formerly socialist countries, Latin America countries and countries of the Far East."[679]

Yet, there might also be more practical reasons for the success of the UNIDROIT Principles. To quote an experienced American lawyer:

> "[t]he great importance of the [UNIDROIT] Principles is that the volume exists. It can be taken to court, it can be referred to page and article number, and persons who are referred to its provisions can locate and review them without difficulty. This alone is a great contribution towards making *lex mercatoria* definitive and provable."[680]

Closer to our concerns though, cases involving the application of the UNIDROIT Principles have indicated that they can indeed provide valuable assistance in filling gaps in CISG, since they have been recognised as a clear expression of "general principles" of international law. Their introduction into the gap-filling mechanism of CISG closes the door to the rules of private international law, which is a positive step towards uniformity.

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[679] *Cf.* M.Blessing, "Regulations in Arbitration Rules on Choice of Law", in *ICCA - Congress Series* No. 7: XIIth International Arbitration Congress, (Vienna, 3-6 November 1994, The Hague / London 1996) 391 at 401.

[680] B.S.Selden, "Lex Mercatoria in European and U.S. Trade Practice: Time to Take a Closer Look", 2 *Golden Gate University School of Law, Annual Survey of International & Comparative Law* (1995) 111 at 122.

CHAPTER 5

CISG CASE LAW – THE FINAL STEP TOWARDS UNIFICATION OF THE LAW ON THE INTERNATIONAL SALE OF GOODS

1. CISG IN PRACTICE – CASE LAW RESULTS AND PATTERNS
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CISG CASE LAW – THE FINAL STEP TOWARDS UNIFICATION OF THE LAW ON THE INTERNATIONAL SALE OF GOODS

1. CISG IN PRACTICE – CASE LAW RESULTS AND PATTERNS

Uniform international law, due to its nature, presents special challenges to those who interpret it. As stated in its Preamble, CISG was created to "contribute to the removal of legal barriers in international trade and promote the development of international trade".[681] As has been argued throughout this work, CISG is an important document whose objectives can be accomplished only if it is interpreted properly. CISG's rules for international trade are now part of the living law of 57 countries that embrace a heavy majority of the world population and trade.[682] Yet the number of international commercial transactions which may be affected by CISG is even greater if one bears in mind that CISG is applicable not only when both parties have their places of business in (different) Contracting States,[683] but also when the rules of private international law lead to the application of the law of a Contracting State,[684] including the case where the forum is that of a non-Contracting State.[685]

Judicial opinions were eagerly anticipated in order to clarify CISG's application, and to ensure certainty and predictability of interpretation, thereby assuaging concerns of both the corporate and legal communities. Already, hundreds of decisions applying and interpreting the CISG have been made by courts and arbitration tribunals around the world. Recently, Professor Will published a list of over 550 CISG decisions.[686] Each year the total number grows, as CISG is adopted and put into practice in additional countries and as disputes ripen into decisions. Professor Bonell has reported a peculiarity about the pattern of reported cases.[687] The leading country in decisions dealing with CISG is Germany, with well over one hundred CISG

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[681] Preamble to CISG.

[682] For an updated list of Contracting States, *see* the Pace University School of Law and Institute of International Commercial Law website, at www.cisg.law.pace.edu .

[683] Article 1(1)(a) CISG.

[684] Article 1(1)(b) CISG.

[685] For the case law on this issue, *see* Bonell & Liguori (1996), *supra* note 401, at 153.

[686] *See* Will (1999), *supra* note 407.

[687] M.J.Bonell and F.Liguori, "The U.N. Convention on the International Sale of Goods: A Critical Analysis of Current International Case Law - 1997 (Part 1)", *Revue de droit uniforme/ Uniform Law Review* (1997) 385-395; also available on the Pace Law School website: http://www.cisg.law.pace.edu/cisg

decisions. Following, in the 20s to 30s, are the Netherlands, Switzerland and France. Close behind is a smaller number of cases taken to the I.C.C. Arbitration Tribunal in Paris and to the International Arbitration Tribunal in the Russian Federation. Finally, with between 2 and 6 reported cases, are Argentina, Australia, China, Denmark, Hungary, and the United States.

The great majority of cases are in central Europe – in countries that had over a decade of satisfactory experience with the predecessor to the CISG, the 1964 Hague Convention that provided uniform rules for international sales.[688] On the other hand, the United States, one of the earliest adherents to the CISG, with its massive volume of international trade, has surprisingly produced very few cases.

The desire in some trade sectors to exclude CISG's application altogether, the use of alternative means of dispute resolution and the non-publication of relevant awards are the main reasons why in some countries, such as Italy or the United States, the case law relating to CISG is still rather limited.[689] A further reason for this development is the apparent reluctance of the result-oriented international business community and international legal practitioners to embrace CISG because of the unpredictability of law in international sales transactions.[690] The establishment of a record of litigation, wherever adjudicated, could increase predictability.[691]

Notwithstanding these negative practices, the number of national court decisions and arbitral awards applying CISG[692] is constantly growing. Although German and Dutch

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[688] *See* J.Honnold , "The Sales Convention: From Idea to Practice, in Symposium - Ten Years of the United Nations Sales Convention" 17 *Journal of Law and Commerce* (1998) 181-186, also available on the website of the Pace University: http://www.cisg.law.pace.edu/cisg .

[689] *See* Bonell and Liguori (1997), *supra* note 687.

[690] *See* V.S.Cook, "The UN Convention on Contracts for the International Sale of Goods: A Mandate to Abandon Legal Ethnocentricity", 16 *Journal of Law and Commerce* (1997) 257-263.

[691] *See*, e.g., Callaghan (1994), *supra* note 406, at 185, (stating that certainty in international sales would have the effect of "facilitat[ing] the flow of international trade" and generally "serve the interests of all parties engaged in commerce"). In addition, there are other reasons that may account for the under-utilization of the Convention, such as the bargaining power of one of the parties to an international sales transaction to demand application of its own national laws, or the failure of counsel to raise the issue of application of the Convention at trial. *See* H.M.Flechtner, "Another CISG Case in the U.S. Courts: Pittfalls for the Practitioner and the Potential for Regionalized Interpretations", 15 *J.L. & Com.* (1995) 127, at 131.

[692] Up to 219 decisions have been reported in the latest edition (December 1996) of *"UNILEX - A comprehensive and 'intelligent' database on the UN Convention on Contracts for the International Sale of Goods (on disk)"* created at the Centre for Comparative and Foreign Law Studies in Rome and distributed by Transnational Publishers, Irvington, NY, also available in a loose-leaf book as "*UNILEX – International Case law & Bibliography on the UN Convention on Contracts for the International Sale of Goods*", edited by M.J.Bonell with the assistance of F.Liguori, A.Veneziano *et al.*

case law continues to be the most copious, Austrian, French, Swiss and Hungarian judgments are increasing in number while judgments handed down by courts in Denmark,[693] Belgium[694] and China[695] have been reported for the first time.
In addition to the awards of the I.C.C. Court of Arbitration in Paris and the International Court of Arbitration of the Federal Chamber of Commerce of Vienna, some interesting arbitral awards have now been rendered under the Rules of the Hungarian[696] and Russian Federation[697] Chambers of International Commerce.
In this formative stage of CISG's jurisprudence, courts must pay particular attention to developing a method of interpretation that takes into account CISG's international character. Legal scholars and commentators have long recognised the enormous potential of CISG as a historic milestone towards unification of international law.[698] However, it is the business community and legal practitioners that will cast the final decisive votes by either embracing CISG, or by opting out of it, based upon their perception as to whether the courts are able to implement it as a unifying tool in international sales transactions.
The disappointing element that emerges from a survey of the existing CISG case law is the fact that very rarely do decisions take into account the solutions adopted on the same point by courts in other countries. A treaty is only as good as its

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With the latest issue of August 1996 (A/CN.9/SER.C/ABSTRACT/16 August 1996), the total number of cases relating to CISG reported in the CLOUT bulletins published by the UNCITRAL Secretariat amounts to 143.
For legal writings on the international case law on CISG, *see*, e.g., L.F.Del Duca & P.Del Duca, "Practice Under the Convention on International Sale of Goods (CISG): A Primer for Attorneys and International Traders (Part II)", *Uniform Commercial Code Law Journal* (1996) 99; A.Veneziano, "Non Conformity of Goods in International Sales. A Survey of Current Caselaw on CISG", *Revue de droit des affaires internationales* (1997) 39.
[693] *Sø-og Handelsrets Domme* (S.H.D.), 1 July 1992, in *Ugeskrift for Retsvaesen* (1992) 920; *Ostre Landsert Kobenhavn* (O.L.K.), 22 January 1996, in *Ugeskrift for Retsvaesen* (1996) 616.
[694] *Tribunal de Commerce de Bruxelles,* 11ème ch., 13 November 1992 n. RG 4.825/91, in UNILEX 1996; *Tribunal de Commerce de Bruxelles,* 7ème ch., 5 October 1994, n. RG 1.205/93, in UNILEX 1996.
[695] *Xiamen Intermediate People's Court,* 31 December 1990, in G. Guoting (ed.), *Analysis of Modern Chinese Commercial Disputes with Foreign Elements* [in Chinese], (Beijing, 1995) 132; and *Xiamen Intermediate People's Court,* 5 September 1994, *ibid.*, at 153. *See* abstract in UNILEX 1996.
[696] *Hungarian Chamber of Commerce and Industry Court of Arbitration*, 17 November 1995, n. VB/94124, in UNILEX 1996; and *Hungarian Chamber of Commerce and Industry Court of Arbitration*, 5 December 1995, n. VB/94131, in UNILEX 1996.
[697] *Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry,* awards n. 309/1993 of 3 March 1995 (CLOUT Case 139), n. 155/1994 of 16 March 1995 (CLOUT Case 140), n. 200/1994 of 25 April 1995 (CLOUT Case 141), and n. 123/1992 of 17 October 1995 (CLOUT Case 142).
[698] CISG has long been a favorite topic among commentators and scholars. For an excellent compilation of English (and other language) writings on the Convention, *see* the Pace Law School website at www.cisg.law.pace.edu .

implementation and interpretation. Since the goal of CISG is the unification of the law pertaining to international sales, predictability and certainty of interpretation is desirable. Unfortunately, there is no single judicial body charged with applying the Convention. Instead, domestic fora – whether they are national courts, or arbitration panels – will interpret its provisions. The decisions concerning CISG are not subject to central review; there is no central world court that reviews the decisions in the various countries applying the CISG. Until now, it would appear that there are only two decisions rendered by national judges in which express reference is made to foreign precedents.[699]

The first of these judgments was handed down by the *Tribunale Civile* of Cuneo. In this case, the Italian court had to apply the CISG provisions which require the buyer to examine the goods and give notice of any lack of conformity. For the purpose of interpreting the rather vague formulae "within as short a period as is practicable in the circumstances" and "within a reasonable time", contained in the relevant Articles 38 and 39 CISG, the court did not hesitate to refer to two judgments handed down in similar cases in Switzerland by the *Pretore* of Locarno-Campagna, and in Germany by the *Landgericht* of Stuttgart.[700]

The second judgment was rendered by the *Cour d'appel* of Grenoble.[701] In this instance, the court expressly referred to a decision of the *Oberlandesgericht* of Düsseldorf[702] to demonstrate that "*l'interprétation habituellement donnée de [l'article 57 de la Convention] est qu'elle exprime le principe général que le paiement s'exécute au domicile du créancier.*"

There are also some decisions in which CISG has been interpreted and/or integrated by express reference to the UNIDROIT Principles of International Commercial Contracts.[703] In particular, mention may be made of an award by the I.C.C. Court of Arbitration in Paris[704] which, following a precedent set by the International Court of

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[699] It should be noted that in both decisions the UNILEX database is expressly referred to as a source of reference for foreign case law on CISG.

[700] *Tribunale Civile di Cuneo*, 31 January 1996, n. 45/96 (Sport D'Hiver di Genevieve Culet c. Ets. Louys et Fils), in UNILEX 1996. The foreign cases cited by the Italian judges are: *Pretura di Locarno-Campagna* (Switzerland), 27 April 1992, n. 6252, in UNILEX 1996, and *Landgericht Stuttgart*, 31 August 1989, n. 3KfH 097/89, in *Recht der Internationalen Wirtschaft* (1989) 984.

[701] 23 October 1996 (unpublished), *supra* note 611.

[702] *Cf. Oberlandesgericht Düsseldorf*, 2 July 1993, n. 17 U 73/93, in *Recht der Internationalen Wirtschaft* (1993) 843.

[703] *See* Bonell (1997), *supra* note 562.

[704] *ICC Court of Arbitration*, n. 8128/1995, in UNILEX 1996; *supra* note 605.

Arbitration of the Federal Chamber of Commerce of Vienna,[705] applied the UNIDROIT Principles in order to determine the rate of interest.

Commentators around the world have already published critical analyses of the CISG case law, in which they discuss various court decisions and arbitral awards on a large number of CISG's provisions.[706] For example, there are many cases dealing with matters implicitly excluded from the ambit of CISG. Since the list provided in Article 4 CISG is not an exhaustive one, problems arise in determining what other matters are excluded from the scope of CISG – and are thus governed by the applicable domestic law – and in distinguishing them from matters which, though not expressly settled in CISG, fall within its scope and must therefore be settled in conformity with the general principles underlying CISG (Article 7(2)).[707] There are decisions which confirm that CISG does not cover issues relating to the capacity of the parties,[708] the existence of an agency relationship,[709] the right to set-off against the other party's claim,[710] the validity of the assignment of one party's right to third parties,[711] prescription (*i.e.*, limitation period),[712] the validity of a penalty clause,[713]

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[705] *Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft,* Wien, Schiedsspruche SCH 4318 and SCH 3466 of 15 June 1994, *supra* note 604.

[706] *See, e.g.*, Bonell and Liguori (1997), *supra* note 687; F.Ferrari, "CISG Case Law: A New Challenge for Interpreters?", 17 *Journal of Law and Commerce* (1999) 246-261; M.Karollus, "Judicial Interpretation and Application of the CISG in Germany 1988-1994", *Cornell Review of the Convention on Contracts for the International Sale of Goods* (1995) 51-94; Flechtner (1995), *supra* note 691; J. M. Darkey, "A U.S. Court's Interpretation of Damage Provisions under the U.N. Convention on Contracts for the International Sale of Goods: A Preliminary Step towards an International Jurisprudence of CISG or a Missed Opportunity?", 15 *Journal of Law and Commerce* (1995) 139-152; Callaghan (1995), *supra* note 406. All the above commentaries also available on the Pace Law School website: http://www.cisg.law.pace.edu/index.html .

[707] For a detailed examination of this problem *see* Hartnell (1993), *supra* note 572.

[708] *Cf. Landgericht Hamburg,* 26 September 1990, n. 5 O 543/88, in IPRax: *Praxis des Intemationalen Privat - und Verfahrensrechts* (1991) 400.

[709] *Cf. Landgericht Hamburg,* 26 September 1990, cit.; *Landgericht Berlin,* 24 January 1994, n. 2 U 7418/92, in *Recht der Internationalen Wirtschaft* (1994) 683; *Amtsgericht Alsfeld,* 12 May 1995, n. 31 C 534/94, in *Neue Juristische Wochenschrift Rechtsprechungs-Report* (1996) 120.

[710] *Cf. Arrondissementsrechtbank Arnhem,* 25 February 1993, n. 1992/182, *in Nederlands Internationaal Privaatrecht* (1993) nr.445, *Arrondissementsrechtbank Roermond,* 6 May 1993, n. 920159, in UNILEX 1996; *Oberlandesgericht Koblenz,* 17 September 1993, n.2 U 1230/91, in *Recht der Internationalen Wirtschaft* (1993) 934; *Oberlandesgericht Hamm,* 9 June 1995, n.11 U 191/94, in IPRax: *Praxis des Internationalen Privat- und Verfahrensrechts* (1996) 269; *Oberlandesgericht Stuttgart,* 21 August 1995 n. 5 U 195/94, in *Recht der Internationalen Wirtschaft* (1995) 943; *Oberlandesgericht Düsseldorf,* 11 July 1996, n.6 U 152/95, in *Recht der Internationalen Wirtschaft* (1996) 958. A different opinion seems to be found in the judgment rendered by the *Arrondissementsrechtbank Middelburg,* 25 January 1995, n.300/94, *in Nederlands Internationaal Privaatrecht* (1996) nr. 127, which held that set-off is a matter not expressly settled by the Convention.

[711] *Cf. Bezirksgericht Arbon,* 9 December 1994, n. BG 9341/94, in UNILEX 1996; *Oberlandesgericht Hamm,* 8 February 1995, n. 11 U 206/93, in IPRax: *Praxis des Internationalen Privat- und Verfahrensrechts* (1995) 197.

the recovery of damages arising from mandating an agent to collect debts,[714] the validity of a settlement agreement,[715] and defects in consent.[716]

In this chapter, closer attention is paid to the caselaw concerning the interpretative issues in Articles 7(1) and 7(2) CISG which were raised in the previous chapters of this work and relate to the thesis advanced herein. As such, mention must be made of an award rendered by the I.C.C. Court of Arbitration affirming the applicability of CISG as an expression of the new "*lex mercatoria*".[717] As the contract did not indicate the applicable law, the arbitral tribunal, pursuant to Article 13(3) of the I.C.C. Rules, held that the contract was governed by the general principles of international commercial practice and accepted trade usages, and as such by CISG which reflects these principles and usages.

Mention may also be made of a decision by an Italian State court concerning a contract for the sale of raw oil, which contained a FOB clause as well as a reference to NIOC standard terms. Although the contract was not governed by CISG, the *Corte d'Appello* of Genova made an express reference to CISG in support of its ruling that the FOB clause's scheme was binding as an international trade usage (under Article 9 CISG).[718]

The marked contrast between CISG's increasing world-wide acceptance, on the one hand, and its insignificant practical use in the United States, on the other, is cause for great concern for those of us who believe that the U.S., being one of the earliest adherents to the CISG and entertaining a massive volume of international trade, has an important role to play in the development and establishment of CISG as the

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[712] *ICC Court of Arbitration*, 23 August 1994, n. 7660/JK, in ICC *International Court of Arbitration Bulletin* (1995) n. 6, 69; *Oberlandesgericht Hamm*, 9 June 1995, n. 11 U 191/94, in IPRax: *Praxis des Internationalen Privat- und Verfahrensrechts* (1996) 269.

[713] *ICC Court of Arbitration*, n. 7197/1992, in *Journal du droit international* (1993) 1028; *Gerechtshof Arnhem*, 22 August 1995, n. 94/305, in *Nederlands Intemationaal Privaatrecht* (1995) nr. 514.

[714] *Oberlandesgericht Rostock*, 27 July 1995, n. 1 U 247/94, in *OLG-Report* (1996) 50.

[715] *Landgericht Aachen*, 14 May 1993, n. 43 O 136/92, in *Recht der Internationalen Wirtschaft* (1993) 760.

[716] *Handelsgericht St. Gallen*, 24 August 1995, n. HG48/1994, in UNILEX 1996. On the other hand, application of the Convention precludes recourse to domestic laws regarding defects in the quality of the goods and *"Wegfall der Geschäftsgrundlage"*, as these matters are exhaustively covered by the Vienna Convention, as rightly pointed out by *Landgericht Aachen*, 14 May 1993, n. 43 O 136/92, in *Recht der Internationalen Wirtschaft* (1993) 760.

[717] *ICC Court of Arbitration*, case n. 7331/1994, in ICC *International Court of Arbitration Bulletin* (1995) n. 6, 73. This issue is central to the thesis of the present writer; *see* Chapters 1 and 2 of this work, *supra*.

[718] *Corte d'Appello di Genova*, 24 March 1995 (Marc Rich & Co. A.G. v. Iritecna), in *Diritto Marittimo* (1995) 1054, with a note by M. Lopez de Gonzalo, "La rilevanza degli usi nella disciplina dell'obbligazione di consegna nella vendita marittima", *ibid.*, at 1055.

uniform code on international sale of goods. This phenomenon must be examined further, since it involves a wide range of key theoretical and practical interpretative issues that affect CISG, such as the treatment of CISG's international character by the courts of a major Contracting State and the methodology that will actually promote uniformity in CISG's application. The fact that the American case law has not fulfilled the expectations of the present writer (as these are expressed through the thesis advanced in this work), but demonstrates a fallacious approach to CISG instead, makes its analysis more important since it can act as a paradigm of the pitfalls that current and future interpreters of CISG must avoid.

2. CRITICAL ANALYSIS OF THE U.S. CASE LAW ON CISG – AN INTERPRETATION OF CISG BASED ON DOMESTIC LAWS AND PRACTICES

(a) Introduction

Only two cases interpreting the Convention have arisen in the courts of the United States to date,[719] despite the broad scope of CISG, which applies to all international sales contracts where the seller and the buyer maintain their places of business in different Contracting States,[720] unless expressly opted out of by the parties.[721] Unfortunately, the first reported Circuit Court decision interpreting CISG is disappointing. The court recognised superficially its additional charge, under Article 7(1) CISG, to interpret CISG in light of its "international character and the need to promote uniformity" in its application, but ultimately failed to articulate a method of interpretation that took into account CISG's international character and the stated goal of uniformity in its application.[722]

(b) The factual setting of Delchi Carrier, SpA v. Rotorex Corporation

The second application of CISG by a U.S. court occurred in 1994. The Circuit Court in the Northern District of New York summarily applied CISG, and that case is the subject of this analysis. The Circuit Court in Delchi Carrier, SpA v. Rotorex

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[719] *See* Filanto, S.p.A. v. Chilewich Int'l Corp., 789 F. Supp. 1229 (S.D.N.Y. 1992); Delchi Carrier, SpA v. Rotorex Corp., 71 F.3d 1024 (2d Cir. 1995).

[720] Article 1(1) CISG provides: "This Convention applies to contracts of sale of goods between parties whose places of business are in different States: (a) when the States are Contracting States; or (b) when the rules of private international law lead to the application of the law of a Contracting State."

[721] Article 6 CISG states that "the parties may exclude the application of this Convention ...".

[722] *See* Cook (1997), *supra* note 690, who is of the same opinion with the present writer.

Corporation interpreted the damage provisions of CISG, namely Articles 74-78, and discovered gaps that it filled in a variety of ways.[723]

Delchi, an Italian corporation with its principal place of business in Italy, sued Rotorex Corporation, a New York corporation with its principal place of business in Maryland, for damages arising from Rotorex Corporation's breach of a contract to supply Delchi with compressors, with which Delchi would produce air conditioners. Delchi sought consequential damages from the breach and lost profits from the reduced sales of air conditioners.[724]

Apparently, the compressors sent to Delchi were nonconforming. There appears to be no dispute over whether Delchi had the right to cancel the contract, or whether Rotorex was afforded the opportunity to cure. Before the time for delivery had expired, and after having received the first shipment of compressors, Delchi discovered the defect, rejected the compressors and canceled the contract. At the time Delchi canceled the contract, the second shipment was already on its way to Italy. Funds were expended in attempts by Delchi to remedy the defect in the compressors, but to no avail. Through letters of credit, Delchi paid for two shipments that were subsequently held in storage. Previously ordered Sanyo compressors were then shipped by air in order to maintain production, yet Delchi could still not fill all of its orders.

It is noteworthy that the style and format of the judicial opinion are more congruous with civil law opinions than with common law memoranda, since its analysis is concise and conclusory. Rather than employing the language of CISG, such as "avoidance of the contract", the court utilizes the language familiar to those versed in the Uniform Commercial Code. More questions are raised than answered in the court's recitation of the facts and conclusions of law. Oddly, in its recitation of the facts, the court made legal judgments[725] such as declaring that Delchi received fewer compressors than "reasonably expected". The meaning of "fundamental breach" under CISG was not analyzed in Delchi, and is yet to be addressed by U.S. courts.

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[723] *See* Delchi Carrier, SpA v. Rotorex Corp., No 88-CV-1078, 1994 WL 495787 (N.D.N.Y. Sept. 9, 1994); 71 F.3d 1024 (2d Cir. 1995).

[724] From the facts in the opinion, Delchi made no claims for direct damages.

[725] While courts have great discretion to award damages due to the vague and uncertain rules of both civil and common law, questions of law or of secondary facts as they are named in the U.K. are reviewable on appeal since they are not pure questions of fact; *see* G.H.Treitel, *Remedies for Breach of Contract* (1988) 176.

(c) The decision in Delchi Carrier, SpA v. Rotorex Corporation

The court determined that the compressors failed to conform to the specifications and to the sample provided by Rotorex to Delchi prior to execution of the contract. After Rotorex failed to cure the defects, Delchi brought suit for breach of contract and recovery of damages, including consequential damages for lost profits and certain incidental damages.

Once the court finally addressed the conclusions of law, CISG was identified as the applicable law under Article 1(1)(a). Rather than citing the language of the article and applying it to the facts of the case, the court cited two cases: Filanto, SpA v. Chilewich Int'l Corp.,[726] the first U.S. judicial interpretation of CISG, and Orbisphere Corp. v. United States, an international trade court case that discusses, in a footnote, that CISG is the applicable law to some international sales contracts between the U.S. and foreign parties.[727]

The court awarded consequential damages for the following: expenses incurred as a result of Delchi's attempt to remedy the nonconformity of the goods, due to the foreseeability of the result of Rotorex's breach; expenses for expedited shipment of the Sanyo compressors, since Delchi was required by Article 77 CISG to mitigate its loss; handling and storage expenses of the rejected compressors, as a reasonable expense; and lost profit, as a foreseeable and direct result of the breach. Fixed costs of production were disallowed, since they were accounted for in lost profits; pre-judgment interest was awarded, and when the judgment was converted into dollars Delchi was awarded approximately $1,248,000.

(d) The methodology followed in the Delchi case

The methodology that has been advanced in the present writer's thesis is underpinned by the opinion that a domestic law resolution of an issue would not promote the creation of a uniform and coherent trade law, because decisions based on domestic law are less likely to be adopted by foreign courts.[728] Instead of reverting to domestic rules, courts are urged by Honnold to fill gaps through an

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[726] Filanto, SpA v. Chilewich Int'l Corp., 789 F. Supp 1229 (S.D.N.Y. 1992), *appeal dismissed*, 984 F.2d 58 (2d Cir. 1993).

[727] Orbisphere Corp. v. United States, 13 C.I.T. 866, 726 F. Supp. 1344, 1355 fn.7 (*Ct. Int'l Trade* 1989). The court fails to note that according to Article 95 and the reservation by the U.S., CISG does not apply to transactions between U.S. parties and foreign parties whose principal place of business is not in a contracting party's State.

[728] *See* Chapters 3 and 4 of this work, *supra*; *see* also, Honnold (1988), *supra* note 351, at 211.

analogical application of the Code, a civil law approach.[729] And as noted by Lookofsky, one

> "... can hardly expect a totally uniform application, but in the hands of the internationally minded judge or arbitrator, the CISG can serve as a starting point, a good common ground."[730]

The court in the Delchi case set the stage in its decision by pointing out that the case "is governed by the CISG" – an international agreement which requires

> "... that its interpretation be informed by its 'international character and . . . the need to promote uniformity in its application and the observance of good faith in international trade'."[731]

Interpreting Article 25 CISG, the court held that Rotorex' failure to deliver conforming goods constituted a "fundamental" breach, which is a breach that substantially deprived Delchi of "[what] it was entitled to expect under the contract."[732] Having found a "fundamental" breach, correctly according to the present writer, the court examined Article 74 CISG to determine the recovery amount that would "equal . . . the loss" suffered by Delchi, including consequential and incidental damages "suffered by [Delchi] as a consequence of the breach."[733] The court then proceeded correctly to identify "the principle of foreseeability" as the applicable limitation to recovery under Article 74 CISG. However, at this point the encouraging initial signals emitted by the court were replaced by a sudden turn to a domestic analysis of the principle of foreseeability. The court held that "the familiar principle of foreseeability established in Hadley v. Baxendale"[734] applied without any deviation to the principle of foreseeability established in CISG.[735] The court ignored its introduction and proceeded in its analysis in much the same manner as if it had been interpreting a domestic statute. For guidance, it consulted exclusively U.S. decisions and U.S. commentators;[736] no international sources or methods of analysis can be found anywhere in the judgment.

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[729] *See* Honnold (1988), *supra* note 351, at 211.
[730] J.M.Lookofsky, *Consequential Damages in Comparative Context* (1989) 294.
[731] Delchi, 71 F.3d, 1024 (2d Cir. 1995), at 1027-28.
[732] *Ibid.*, at 1028. Article 25 CISG provides: "A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result."
[733] Delchi, 71 F.3d, at 1029.
[734] (1854) 156 Eng. Rep. 145.
[735] Delchi, 71 F.3d, at 1029.
[736] In a literal sense, the *Delchi* court quotes one foreign source, Hadley v. Baxendale. However, this 1854 English decision has been an integral part of U.S. jurisprudence for many years. *See* A.G.

(e) Criticism of the Delchi methodology

The nonchalance of the court's determination that CISG was the applicable law is striking. Furthermore, the judgment in Delchi is more noteworthy for the dearth of analysis and the methodology utilised to support the conclusions, than for the actual reasoning employed.[737]

CISG needs to be examined as an integrated whole rather than through piece-meal interpretation of its articles analysed in isolation from other relevant provisions. As one of the first U.S. courts to interpret CISG, the court in Delchi should have conducted a careful and detailed analysis of all the relevant provisions applied to the facts, including the legislative history of these provisions. Such a thorough application would have been invaluable to the development of the CISG case law. By focusing only on the remedy provisions, the court missed an important opportunity to contribute to the international jurisprudence on CISG.

The critical analysis of the Delchi judgment involves issues of both form and substance. The two main questions to be examined involve the court's methodology (concerning the deference afforded by the court to the international character of CISG), as well as the correct application of CISG on the facts of the particular case. The answers to these questions shed light on how future U.S. courts might interpret CISG.[738]

The court in Delchi seemingly ignored the general consensus concerning the appropriate method of analysis to be employed when interpreting the provisions of CISG.[739] Article 7(1) CISG directs that the language of CISG must be carefully interpreted in accordance with CISG's "international character", the need to promote uniformity in CISG's application and the observance of "good faith in international trade." The present writer argued in Chapter 3 of this work that in CISG the elements of "internationality" and "uniformity" are not only inter-related but also inter-dependent. International (rather than national) interpretation is necessary in order for

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Murphey, Jr., "Consequential Damages in Contracts for the International Sale of Goods and the Legacy of Hadley", 23 *Geo. Wash. J. Int'l. L. & Econ.* (1989) 415, at 416, fn.5 (stating that Hadley "has been one of the more important cases for students in American law schools".); *see also* Delchi, 71 F.3d, at 1028 (referring to the Hadley rule as "the familiar principle of foreseeability").

[737] For similar academic criticism of the Delchi case, *see* Cook (1997), *supra* note 690; Darkey (1995), *supra* note 706; both available on the Pace Law School website.

[738] In addition, Delchi creates precedent for the application of the damage provisions of CISG.

[739] *See, e.g.*, Honnold, (1991), supra note 53, at 135-161; Darkey (1995), *supra* note 706, at 140-142; *see also* F.Ferrari, "Specific Topics of the CISG in the Light of Judicial Application and Scholarly Writing", 15 *J.L. & Com.* (1995) 1, at 8-13.

uniformity in the application of CISG to be achieved and uniformity of application is vital if CISG is to maintain its international character; a goal supported by the language of CISG. On the other hand, an autonomous and uniform interpretation would go a long way towards completing the process of unification and achieving the aims of the drafters of the international instrument.

It was also argued in Chapter 3 that in interpreting CISG the rules and techniques traditionally followed in interpreting ordinary domestic legislation should be avoided and that Article 7 CISG represents an implied provision in the body of the law for the undertaking of a liberal approach to CISG's interpretation. The Delchi case provides a perfect example of the shortcomings that a rigid and narrow approach entails.

It is part of the present writer's thesis that the ultimate aim of CISG – to achieve the broadest degree of uniformity in the law for international sales – can not be achieved if national principles or concepts, taken from the law of the forum, or from the law which in the absence of CISG would have been applicable according to the rules of private international law, are allowed to be used in the interpretation of CISG. The court in the Delchi case failed totally in these respects.[740] For instance, when the court had to deal with the issues of pre-judgment interest and the conversion of the award into dollars, it failed to follow the methodology demanded by Article 7(2) CISG and, instead, it followed domestic tradition. It showed a complete disregard of the international jurisprudence and doctrine.

The Delchi decision has also been criticised for the conspicuous absence of any reference by the court to the "general principles" on which CISG is based, such as such as the requirement to interpret CISG in "good faith" and to generally "act reasonably".[741] The handling of the foreseeability issue in examining the damages in the case, which will be discussed below, evinces the confusion in which the court was enveloped and exemplifies the approach not to be followed in similar cases.

The court's statement that "there is virtually no case law under the Convention",[742] is correct with respect to U.S. case law, but without merit with respect to foreign case law since numerous decisions interpreting Articles 25 and 74 CISG, which would

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[740] In the context of the Delchi case, Cook is of the opinion that "good faith" mandates an interpretation that takes account of non-U.S. principles and interpretations developed by the other Contracting States to the Convention; *see* Cook (1997), *supra* note 690.

[741] *See* Cook, *ibid.*

[742] Delchi, 71 F.3d, at 1028.

have assisted it, have been rendered by European courts.[743] Thus, foreign case law was either rendered irrelevant, or was completely overlooked and its persuasive value missed.[744]

The court's lack of the requisite international perspective is admitted in its observation that decisions rendered by a U.S. court under the Uniform Commercial Code are very relevant and that such decisions "may also inform a court where the language of the relevant CISG provisions tracks that of the UCC."[745] The court cautioned, however, that the "UCC caselaw is not *per se* applicable."[746] The court never explained why the Uniform Commercial Code was relevant at all, or why it was not *per se* applicable. Unfortunately, the court showed a complete lack of appreciation of the nature and importance of CISG's new *lingua franca*.[747]

(i) Damages and foreseeability

The court in Delchi awarded damages without discussing the CISG provisions dealing with breach and cure. The absence of any discussion of the conduct required by an injured party before it may recover damages is a critical flaw in the court's analysis. Remedy provisions of CISG cannot be completely understood without taking basic concepts, such as fundamental breach, reasonable notice of defect and time to cure,[748] into consideration. The buyer's rights and subsequent recovery of damages are affected by the seller's right to cure.[749]

The facts of the case supported a finding of the requisite amount of foreseeability under both the Article 74 CISG definition of foreseeability, as well as under the Hadley v. Baxendale rule of foreseeability, but doctrinal clarity requires further analysis of the two rules to reach this result.[750]

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[743] *See, e.g.*, 2 *Guide to Int'l Sale Goods Convention* (Business Laws, Inc.) 201.070, 201.167 (June 1996) (providing annotations of domestic and foreign courts for each CISG article, specifically Articles 25 and 74).

[744] *See* Honnold (1988), *supra* note 351; Cook (1988), *supra* note 347.

[745] 71 F.3d, at 1028 (*citing* Orbisphere Corp. v. United States, 726 F. Supp. 1344, 1355 (*Ct. Int'l Trade* 1989)).

[746] 71 F.3d, at 1028.

[747] For a discussion of the nature and importance of CISG's language, *see* Ch. 2 of this work, *supra*.

[748] *See* J.Vilius, "Provisions Common to the Obligations of the Seller and the Buyer", in P.Sarcevic & P.Volken eds., *International Sale of Goods: Dubrovnik Lectures* (New York: Oceana, 1986), at 239-40. Article 25 CISG defines fundamental breach and Article 37 delineates the seller's right to cure nonconformity.

[749] *See* E.C.Schneider, "The Seller's Right to Cure Under the UCC and UNCISG", 7 *Ariz. J. Int'l & Comp. L.* (1989) 69, at 102.

[750] *See* Murphey (1989), *supra* note 736 (analyzing the differences between Article 74 CISG and Hadley v. Baxendale); J.S.Ziegel, "Canada Prepares to Adopt the International Sales Convention", 18 *C.B.L.J.* (1991) 1, at 14.

The dissimilar content of the two formulations of "foreseeability" has been examined by scholars.[751] Article 74 CISG limits recovery for consequential damages to those matters that

> "... the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract."

In contrast, the Hadley v. Baxendale rule of foreseeability tends to restrict recovery to a greater degree, in that it requires the loss to have been

> "... such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."[752]

The two foreseeability formulations bear a superficial similarity, but apply different threshold levels. For example, the Hadley v. Baxendale "probable result" limitation is much more restrictive than the "possible consequence" limitation of Article 74 CISG. Article 74 CISG provides the general rule for a calculation of damages for losses suffered by the buyer, or seller, as a result of a breach and seeks to place the injured party in the position it would have been had the other party properly performed the contract.[753] Similar to the U.C.C., the consequences of the breach need only be contemplated by the breaching party.[754] Thus, the foreseeability standard is less stringent under CISG, which increases the liability of the breaching party.[755] The court did not cite the pertinent language of Article 74 CISG. Instead, it merely declared that the damages sustained by Delchi in its attempt to remedy the nonconformity of the compressors were a foreseeable result of Rotorex's breach.[756] Despite the lack of analysis on foreseeability and certainty of damage, Delchi received most of its claimed consequential damages, thereby supporting the assertion that there is a trend of liberal recovery of consequential damages in U.S. courts.[757]

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[751] *See* Murphey (1989), *supra* note 736, at 420, 430-31; Ziegel (1991), *supra* note 750, at 14.
[752] Hadley (1854) 156 Eng. Rep. 151.
[753] *See* Murphey (1989), *supra* note 736, at 420.
[754] *See* U.C.C. § 2-715(2)(a) (1987).
[755] Article 74 CISG provides both an objective and subjective test for foreseeability, and the consequence of the breach need only be *possible*; *see* Murphey (1989), *supra* note 736, at 439-40.
[756] In contrast, the court refused to allow recovery for the cost of production line employees' down time, which occurred because there were not conforming compressors to be installed. Making no mention of foreseeability, the court denied recovery on the basis that the costs were fixed and as such, they were accounted for in recovery of lost profits.
[757] *See* Murphey (1989), *supra* note 736, at 422-24. Further, as noted by commentators, CISG increases the breaching party's liability beyond what the party is exposed to under the U.C.C: *see* Murphey (1989), *supra* note 736, at 439-40; F.Ferrari, "Comparative Ruminations on the

(ii) Mitigation and reasonable expense

Even the standards for proving damages were relaxed by the Delchi court. Without citing authority, the court awarded a "reasonable expense" for storage of the nonconforming goods, when Delchi was unable to establish the exact expenditure. This language used by the court echoes that of Article 86(1) CISG,[758] which the court may have read in order to reach its conclusion. It is unclear, however, whether the court was actually referring to CISG, since the court does not cite Article 86 CISG.

In awarding the cost of the expedited shipment of substitute compressors, the Delchi court recognized that Article 77 CISG bars recovery for damages that could have been mitigated. However, the court refused to classify the purchase of substitute compressors as cover, thereby precluding the recovery of direct damages under Article 75 CISG. Paradoxically, it was determined that the shipment of other compressors at an earlier date than was originally planned was an attempt to mitigate damages. However, the court found that they did not replace the nonconforming compressors since they had been previously ordered. Again, the court did not cite the language of Article 75 CISG, which would have supported its conclusion.[759]

(iii) Lost profits

A large portion of the award in Delchi consisted of damages for lost profits arising from Delchi's lost sales of air conditioners. Professors Honnold[760] and Sutton[761] were cited as the only authorities to support the assertion that CISG permits recovery of diminished volume of sales. Honnold discusses the availability for recovery of lost volume of sales only in situations where Articles 75 and 76 CISG provide no redress. However, in Delchi, Articles 75 and 76 CISG were not applicable since the court had held that there was no market differential, or cover. Article 74 CISG explicitly allows

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Foreseeability of Damages in Contract Law", 50 *Ohio St. L.J.* (1989) 737. Therefore, given the predisposition of U.S. courts to liberal recovery of damages and the less stringent foreseeability requirement of CISG, an aggrieved party bringing suit on a CISG claim in a U.S. court should be well satisfied.

[758] Article 86(1) CISG states that "[i]f the buyer has received the goods and intends to exercise any right under the contract or this Convention to reject them, he must take such steps to preserve them as are reasonable in the circumstances. He is entitled to retain them until he has been reimbursed his *reasonable expenses* by the seller." (emphasis added).

[759] Article 75 CISG states that "[i]f the contract is avoided and if, in a reasonable manner and within a reasonable time AFTER avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under Article 74." (emphasis added).

[760] *See* Honnold (1991), *supra* note 53, at 416.

[761] *See* J.Sutton, "Measuring Damages Under the United Nations Convention on the International Sale of Goods", 50 *Ohio St. L.J.* (1989) 737.

the recovery of lost profit, thus rendering the question of recovery of lost volume of sales under the other remedy provisions a moot point.

(iv) Pre-judgment interest

Article 78 CISG authorises recovery of interest on the payment price, or any sum in arrears. Under CISG it is not clear whether a party is entitled to recover interest on an unliquidated amount, which was the case in Delchi. Given the internationally controversial nature of interest,[762] the final language of Article 78 CISG – entitling a party to interest if the other party fails to "pay the price or any other sum that is in arrears" – was a drafting compromise among the Contracting States.

Professor Honnold discusses two situations that fall within the scope of Article 78 CISG; when a buyer delays paying the seller, and when a seller delays refunding the purchase price for defective goods.[763] However, neither of these two situations was applicable in the Delchi litigation.

Honnold also discusses the question of liquidated sums and observes that some jurisdictions do not recognise interest accruing until the amount in arrears is made certain.[764] The U.C.C. makes no mention of the ability to recover interest on incidental damages.[765] A U.S. federal court has commented on the wide availability of pre-judgment interest as follows:

> "[u]nless there is a statutory provision to the contrary, the court has broad discretion in deciding whether to award prejudgment interest".[766]

The Delchi court followed the domestic tradition of discretionary awards of pre-judgment interest of unliquidated sums.[767] However, it is far from clear that the drafters of CISG intended that interest on consequential loss, including lost profits, be awarded and calculated at the rate of the debtor's country.[768]

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[762] *See* Darkey (1995), *supra* note 706, the text corresponding to fn.46, where she mentions that some States prohibit or limit the rate of interest due to religious or public policy rationales.

[763] *See* Honnold (1991), *supra* note 53, at 424-5.

[764] *See* Honnold, *ibid.*

[765] *See* G.H.Cain, "The Vienna Convention: Posing a New International Law of Sales", 57 *Conn. Bar. J.* (1983) 327, at 336.

[766] Ambromovage v. United Mine Workers, 726 F.2d 972, at 982 (3d Cir. 1984).

[767] *See In re* Vic Bernacchi & Sons, Inc., 170 B.R. 647, 657 (Bkrtcy. N.D. Ind. 1994) (*citing* Board of County Comm'rs of Jackson v. United States, 308 U.S. 343, 352 (1939)).

[768] *See* Darkey (1995), *supra* note 706, at fn. 52, where she notes that this " is especially true in view of the reluctance of Muslim nations to include interest as a recoverable damage award at all. It is even unclear under U.S. law whether interest on consequential damages should be awarded. Honnold remarks that an interpretation of the *Restatement (Second) of Contract* provision for allowance of interest in cases 'as justice provides' could support such an award" and cites Honnold (1991), *supra* note 53, at 422, fn.7 (*citing* Restatement (Second) of Contracts § 354, ¶ 2, cmt. *d*).

Even if recovery of pre-judgment interest was warranted, there still remains a question of what rate should be used in calculating the interest. Noting that Article 78 CISG does not specify an applicable interest rate, the Delchi court awarded interest at the rate established by U.S. federal law for the award of post-judgment interest.[769] The court made no reference to Article 7 CISG, which provides a uniform application for gap-filling. Nor did it examine the legislative history of CISG or refer to scholarly opinion. Ironically, the court, which was so receptive to scholarly authority on the issue of lost profits, does not follow Professor Sutton's recommendations for interpretations of the gap in Article 78 CISG, which were made in the same journal article that the court cited earlier in its opinion.[770]

The legislative history of Article 78 CISG indicates that it is a controversial provision, because during its drafting there was much debate over its wording.[771] A rule on interest was omitted in earlier drafts of the CISG and there is no commentary, as is provided for other CISG articles,[772] to allow insight on its development. However, a 1976 draft included a provision for interest awards to the seller.[773] Article 58 CISG of this draft provided for interest at the rate of the country of the seller's principal place of business.[774]

While a court is not bound by the rationale employed in previous drafts of CISG, which at times could even mislead the interpreter, it would be wise to examine these drafts in order to get a better understanding of the scope and content of the specific article in the overall context of CISG.[775] There is academic opinion supporting the view that the appropriate interest rate would be the interest rate of the country where the injured party has its place of business, since this is the cost of credit.[776]

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[769] *See* Darkey, *ibid.*, at fn.53, who makes this observation: "Even though 28 U.S.C. § 1961 does not set a standard for determining the rate of prejudgment interest, courts have used it for such a purpose."

[770] Professor Sutton advocates the use of prior drafts as a source for determining the calculation of interest, *see* Sutton (1989), *supra* note 761, at 749.

[771] *See* Honnold (1991), *supra* note 53, at 422; Sutton (1989), *supra* note 761, at 749.

[772] *See* Sutton (1989), *supra* note 761, at 749 (citing "Comments by Governments and International Organizations on the Draft Convention on the International Sale of Goods", in [1977] 8 *Y.B. Int'l L. Comm'n* 109; U.N. Doc. A/CN.9/125).

[773] *Ibid.*, citing "Draft Convention on the International Sale of Goods, Art. 58", in [1976] 7 *Y.B. Int'l L. Comm'n* 89, at 94; U.N. Doc. A/CN.9/116, annex. I.

[774] *See* Sutton (1989), *supra* note 761, at 749.

[775] Furthermore, the proposal that the rate of interest be determined by applicable domestic law of the forum was rejected at a diplomatic conference; *see* G.Corney, "Obligations and Remedies Under the 1980 Vienna Sales Convention", 23 *Queensland L. Soc. J.* (1993) 37, at 56.

[776] *See* Sutton, *ibid.*, at 750, where he comes to this conclusion on a combination of the fact that Article 78 CISG extends interest recovery to the buyer as well as to the seller and by an extension of the analogous provision of the previous draft of the article in question.

In addition, foreign courts have addressed the interest issue, albeit in fact scenarios where the buyer was the breaching party due to nonpayment. Applying a conflict of law analysis, German courts have held that the law of the aggrieved party's country should be applied when determining the interest rate.[777] The International Court of Arbitration applied the law of the place of payment to determine the interest rate owed on an unpaid balance to the seller.[778]

The objections of the present writer on the issue of resorting to domestic laws for settling disputes that arise in connection to the application of CISG, as expounded in earlier chapters of this work, preclude a conflict of laws solution and propose an approach based on general principles instead.[779] According to the methodology provided in Article 7(2) CISG, determining the method of calculation of interest by a domestic conflicts of law analysis should only be employed as a last resort by a court once general principles of CISG cannot be ascertained.[780] In conformity with the general principles of CISG – specifically, those in Article 74 CISG, which strives to award recovery of suffered losses, and Article 75 CISG, which calculates compensation by the cost of the substitute transaction – interest should be calculated by the cost of credit faced by the injured party.[781] This position is preferable to the other ones noted above, because it keeps the rules of private international law out of the application of CISG and thus supports the thesis of the present writer on the point. By applying the U.S. federal rate, which is the rate of the country of the breaching party, the Delchi court did not promote the uniformity that is the goal of CISG.[782]

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[777] *Landgericht Stuttgart;* 3KfH O 97/89 31 Aug. 1989, abstract in 14 *J.L. & Com.* (1995) 225; *Landgericht Hamburg*; 5 O 543/88 9 Sept. 1990, abstract in 14 *J.L. & Com.* (1995) 228; *Amstgericht Oldenberg in Holstein*; 5 C 73/89 24 Apr. 1990, abstract in 14 *J.L. & Com.* (1995) 227.

[778] *International Court of Arbitration (ICA)* Matter No. 7153 in 1992, translated in 14 *J.L. & Com.* (1995) 217. However, the law is unsettled on this issue, as arbitrators have adopted the rate of the country of the creditor or that of the state of the agreed currency. *See* Callaghan (1995), *supra* note 406, at 198.

[779] *See*, mainly, Chapter 4 of this work, *supra*.

[780] *See* Rosett (1984), supra note 117, at 270-71, stating that CISG's drafters explicitly did not want a judge to refer to domestic law. *Cf.* J.D. Feltham, "The U.N. Convention on Contracts for the International Sale of Goods", *J. Bus. L* (1981) 346, at 359, where he states that the interest rate is "presumably a matter for appropriate national law".

[781] For academic support on this issue, *see* the views of the major contributor to CISG's doctrinal writings, Honnold (1991), *supra* note 53, at 423-24.

[782] *See* Article 7(1) CISG. *See* also, Chapter 3 of this work, *supra*. Furthermore, the court was incorrect to apply a federal statute rather than a State statute to determine the rate of interest, since in diversity cases federal courts look to State law for rules of computing prejudgment interest; *see* Oil Spill, 954 F.2d, at 1333.

(v) Conversion of award to dollars

The Delchi court, citing New York precedent, converted the damages into dollars at the exchange rate effective at the date of the breach.[783] There is no provision in CISG that addresses the proper date for currency conversion. A court may engage in gap-filling, according to the procedures of Article 7(2) CISG, only when a matter is governed by CISG.[784] Obviously, the court did not consider the determination of a date for exchange rate conversion as being governed by CISG, since no gap-filling analysis took place. The rate of conversion may indeed be beyond the scope of CISG since none of the commentaries, including those of Professor Honnold, make mention of the issue.[785] If the matter were governed by CISG and a gap existed, the court would be required to look to the general principles upon which CISG is based.[786] The court offered no discussion on this point, thus missing another opportunity to contribute to CISG's jurisprudence, and simply applied New York law to determine the date for conversion following the "breach-day rule".[787]

The main problem that the conversion of the award could impose on the aggrieved party is that, depending on the relative strength of the dollar to the aggrieved party's home currency, the date of breach may not satisfy the aggrieved party's expectation interest.[788] If a court paid closer attention to this issue and found that CISG governs the matter of conversion, then Article 7(2) CISG could be applied to solve the uncertainty in this area as well and thereby provide greater uniformity in the law. This could happen through analogy to other CISG provisions and by an examination of the general principles of CISG, which could include the protection of an injured party's expectation interest, so that a court may not be required to apply a rigid State law to this issue. However, this would require the court to indulge in a more thorough analysis of CISG's application than the one offered by the court in the Delchi case.

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[783] Citing Middle East Banking v. State Street Bank Int'l, 821 F.2d 897, 902-03 (2d Cir. 1987). The parties in the Delchi case did not dispute that the exchange rate on the date of breach was proper.

[784] *See* Chapter 3 of this work, *supra*.

[785] Although it is probably safer to say that currency conversion goes to compensation, which plainly falls within CISG.

[786] For the methodology to be used in identifying the "general principles" of CISG, *see* Chapter 4 of this work, *supra*.

[787] There is no Federal Rule of Civil Procedure addressing the issue of judgments on foreign money claims. For a discussion of the development of the New York "breach-day rule" and alternative approaches, *see* R.A.Brand, "Exchange Loss Damages and the Uniform Foreign-Money Claims Act: The Emperor Hasn't All His Clothes", 23 *L. & Pol'y Int'l Bus.* (1992) 1, at 7.

[788] *See* Brand, *ibid.*, at 7-8.

(f) Conclusions on the Delchi case

It is submitted that the court in Delchi failed in its attempt to apply CISG, in both form and substance.

The method of interpretation employed by the Delchi court was completely off the track designed for CISG. It showed good intentions initially, but ultimately failed to live up to the importance of the moment. Commentators have cautioned courts against issuing unnecessarily broad interpretations of the CISG, in order to avoid the establishment of erroneous precedent.[789] The Delchi court appears to have taken their advice to the extreme. The discussion and application of CISG was cursory. Special care and thoroughness were not taken and, thus, the opinion does not provide the much-anticipated insight into a U.S. court's rationale and interpretation of CISG. While the court initially offered encouraging general statements on the scope of CISG's application and the international nature of its interpretation, ultimately it fell back to the familiar and domestic practices and laws and did not engage in the requisite statutory analysis, thereby missing an opportunity to contribute to the international jurisprudence of CISG.

The court missed an important opportunity to engage in an international dialogue with references to foreign decisions and commentaries, civil law principles and the international legislative history of CISG itself. According to an American commentator, the court

> "... understood its special mandate to be mindful of 'the international character' in the interpretation of the Convention and 'the need to promote uniformity in its application,' but was clearly unable to overcome its own ethnocentric bias."[790]

It is hoped that the above critical analysis of the U.S. case law has highlighted the practical dimensions of the theoretical difficulties associated with the interpretation of CISG, thus putting the issue of CISG's interpretation and application in its functional context, over and above the academic one. At the end of the day, the litmus test of CISG's function as the uniform law of international sale of goods will take place at the practical level – in courts and arbitral centres.

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[789] *See* R.Brand & H.Flechtner, "Arbitration and Contract Formation in International Trade: First Interpretations of the U.N. Sales Convention", 12 *J.L. & Com.* (1993) 239, at 260.
[790] *See* Cook (1997), *supra* note 690, at 263.

3. AN APPROACH TO CISG'S INTERPRETATION BASED ON INTERNATIONALITY AND GENERAL PRINCIPLES OF LAW

The importance and the feasibility of uniform law for international trade have been established in the earlier chapters of this work.[791] Almost two decades have passed since the "birth" of CISG and it has already been implemented by more than fifty countries world-wide, representing different legal, social and cultural systems.[792] Textual uniformity, achieved by enacting uniform laws, is a necessary but insufficient step towards creating substantive legal uniformity,[793] because the subsequent uniform application of the agreed rules is not guaranteed, as in practice different countries, almost inevitably, come to put different interpretations upon the same enacted words.[794]

This work has considered certain measures that the present writer considers necessary for the healthy growth of CISG into a Convention of uniform law not only in words but, especially, in its interpretation and application. The analysis offered by the present writer has been based on the examination of the nature, scope and function of, arguably, the most important provision of CISG, Article 7.

With the unifying law in force world-wide, jurists and scholars face the following problem: what approaches to interpretation will best promote uniform application of this law? In sum, this work has tried to answer the following questions: Which approaches to interpretation are most appropriate for uniform laws for international sales? Do existing national practices fit the problem at hand? If not, how can one develop more appropriate responses to the special needs of this young and promising member of the international legal order? The job at hand is to consider and evaluate different approaches to the interpretation of CISG.

(a) The language of CISG: Plain meaning and full context

The first hurdle to uniformity is intrinsic to the scope of the legislation under examination. CISG represents an attempt to create *ab initio* an international

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[791] *See*, especially, Chapter 1 of this work, *supra*.
[792] For a list of Contracting States, *see* the Pace University website, at www.cisg.law.pace.edu .
[793] *See* L.M.Ryan, "The Convention on Contracts for the International Sale of Goods: Divergent Interpretations", 4 *Tul. J. Int'l & Comp. L.* (1995) 99, at 101, stating that "textual uniformity... is insufficient."
[794] *See* Munday (1978), *supra* note 328, at 450.

community of members that can communicate and arrange their commercial affairs using the text as their common language.[795]

The basic premise for such an endeavour is the obligation of fidelity to the words of the statute; departures from this principle would necessarily undermine the stated goal. However, the size of the task matches its importance. Legal terms can have an elusive, chameleon-like quality even in domestic legislation. In international legislation, which must be translated into many other languages, the use of domestic legal terminology can produce chaos.

It was noted earlier in this work that throughout the many years of efforts for the unification of international sales law the participants engaged in an ongoing discussion of the goals and methods of the project.[796] A central theme in these unification efforts was the formation and facilitation of an international community whose members can conceive relationships and resolve conflicts through the use of a new and common legal language. The artificial nature of such a new linguistic construct is prescribed by the intrinsic difficulties embedded at the core of the unification process itself. The parameters of the definition and composition of the international community created by CISG, as discussed in Chapter 1 of this work, also permeate the issue of a new *lingua franca*. As it was necessary for the drafters of CISG to articulate a set of issues or topics (and a set of terms in which to discuss these topics) when delineating its field of operation, it was also necessary that the language used to express these issues reflected the values that operate throughout CISG, so that the text of the Convention remain coherent and persuasive in the eyes of the members of that community. Only the process that gave CISG its communality could give CISG's language the requisite legitimacy for the present and the potential for growth in the future. And only the principles underlying the community of CISG could provide the basis for the new language found in CISG, because they suggest a common origin for both the substance and form of the CISG community. Therefore, the drafters of CISG took the unprecedented step of rooting out words with domestic legal connotations in favour of non-legal, "earthy" words that refer to physical acts. For instance, instead of connecting risk of loss with domestic concepts – such as "property", or "title" – CISG provides that risk passes when the goods are "handed

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[795] *See* Chapter 2 of this work, *supra*.
[796] *See* discussion of this point in Chapter 1 of this work, *supra*.

over to the first carrier"[797]; if the buyer is to come for the goods, risk passes when the buyer "takes over" the goods.[798] Drafting in this style imposed not only demanding standards for the interpretation of CISG, but also a new a-national, or supra-national, methodology for the application of CISG.

The drafting style of CISG promotes discussion of the meaning of the language found in it among the members of the CISG community, who are placed on an equal footing. In interpreting the text, applying CISG's provisions and resolving any ambiguities therein, it is paramount that one approaches CISG as a whole and grasps the power of its full context. CISG must not be seen as piecemeal legislation. Its language provides not only formal, but, especially, substantive coherence. There are many other instances where the full context of CISG's provisions resolves ambiguities.[799] For example, under its rule on applicability, CISG applies to a contractual relationship between parties whose "places of business" are in different Contracting States.[800] The ambiguity that could arise regarding the definition of "place of business", could determine whether CISG can be applied, or not, to a particular contract. Suppose that a buyer, based in State A, has sent agents to State B where extended negotiations lead to an international contract for sale of goods. Can it be said that the buyer has a "place of business" in State B? Examining other provisions in CISG can help resolve this potential ambiguity. Article 10(a) CISG states that the relevant "place of business" is the one "with the closest relationship to the contract *and its performance*" (emphasis added). Further assistance is provided by Articles 31(c), 42(1)(b) CISG (concerning the delivery of goods) and 69(2) CISG (dealing with the passage of risk), which refer to important acts of "performance" at the seller's, or buyer's, "place of business".

Therefore, it is submitted that the interpretation of CISG's language must be guided by the principles of true internationality, autonomy and coherency upon which CISG itself stands.

(b) Legislative history: Its nature and scope

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[797] Article 67(1) CISG.
[798] Article 69(1) CISG.
[799] *See*, *e.g.*, the definition of what "goods" the CISG covers. The basic term "goods", as moveable tangible property, is clarified by a series of exclusions in Article 2 CISG, and by "packaging" (Article 35 CISG), replacement of defective parts (Article 46) and warehousing to prevent deterioration (Articles 85-88 CISG).
[800] Article 1(1) CISG.

Experience with domestic statutes that govern a large and complex field tells us that the language of CISG, even in context, will not give a clear answer to all problems of uniform interpretation and application. In addition to the statutory words there is only one other common international point of reference – the legislative history of CISG *(travaux préparatoires)*.[801]

Legal scholars have advocated the consultation of CISG's legislative history by judicial bodies.[802] Until recently it would have been necessary to speak of the resistance of the common law world to consult, or even refer to, the records of a statute's legislative history – a necessary step for multi-lingual instruments. This resistance was exemplified by the stance of the English courts to references by counsel to parliamentary debates – subject to the exception that Hansard's reports of debates may be placed before the court for use by the judges, should they wish to consult this material of their own initiative.[803] However, since the House of Lords made its first important departure from this tradition in construing an international Convention,[804] subsequent decisions in England and the Commonwealth have followed this lead. The broader outlook mandated by multi-lingual international conventions has now received due recognition in common law systems. Article 7(1) CISG itself directs that interpretation should have regard to CISG's "international character and the need to promote uniformity in its application". The proper interpretation of CISG requires consultation of its legislative history, which in some cases can be decisive.[805] As such, the legislative history of Articles 7(1) and 7(2) CISG was examined in previous chapters of this work to gain a better understanding of the nature, scope and content of these provisions[806] – a process that revealed not only the truly international composition of the drafting body, but also the political nature of the drafting compromises in Article 7 CISG.

However, a note of caution has been sounded on the use of *travaux préparatoires*. Once it is enacted, CISG acquires its own life and should not be necessarily and

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[801] Apart from the gradual development of consensus by international case law, which is examined below.

[802] *See, e.g.*. Enderlein *et al.*, (1991), *supra* note 450, at 61; D.J.Rhodes, "The United Nations Convention on Contracts for the International Sale of Goods: Encouraging the Use of Uniform International Law", 5 *Transnat'l Law.* (1992) 387, at 395-96.

[803] *See* the comments on English practice in Honnold (1987), *supra* note 389.

[804] Fothergill v. Monarch Airlines [1980] 2 All ER 696, construing an Act of Parliament that gave effect to the Warsaw Convention on the liability of air carriers.

[805] For the legislative history shedding light on the apparent conflict between Articles 14 and 55 CISG on the validity of "open price" contracts, *see* Honnold (1987), *supra* note 389, at §§ 137.6, 324-325.3.

[806] *See* Chapters 3 and 4 of this work, *supra*.

strictly circumscribed by its preparatory material. Furthermore, one must be alert to the special feature of the legislative process in UNCITRAL's preparation of the 1978 draft for a Sales Convention; namely, that consensus was reached on each provision without ever taking a formal vote. Summaries of the discussions were recorded, but the lack of votes on proposals that were not explicitly accepted or rejected in reaching consensus could blur contours of the decision.[807] Clearer light, however, was shed by UNCITRAL's response to Reports of the Secretary-General; these Reports, distributed in multi-lingual versions in advance of UNCITRAL sessions, usually provided the basis for discussion and action.[808] It is submitted that legislative history can provide a valuable insight into the drafter's intentions but can not hold CISG its life-long prisoner. As such, it can be used as an interpretative aid in CISG's interpretation, but not as the ultimate tool. This last function should be reserved for CISG's case law.

(c) Statutory "gaps" and international uniformity

Domestic approaches to statutory gap-filling differ. For the purposes of CISG's interpretation and application, it is important to consider which approach best serves the objectives of international unification.

The problem is clearly exposed by contrasting the relevant provisions of the two Conventions that have attempted to establish uniform law for international sales – the 1964 Sales Convention (ULIS) and CISG. ULIS was prepared by UNIDROIT, primarily by drafters of civil law background, and stated in Article 17:

> "Questions concerning matters governed by the present Law which are not expressly settled therein shall be settled in conformity with the general principles on which the present Law is based."

In UNCITRAL, and during the 1980 Vienna Diplomatic Conference, many delegates pressed for the above-quoted provision of 1964 ULIS.[809] On the other hand, other delegates, primarily of common law background, were concerned by the leeway that the 1964 Convention might allow for judicial extrapolation of CISG's "general principles". This concern led to the inclusion, in Article 7(2) CISG, of a provision

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[807] This was not true of proceedings at the 1980 Vienna Diplomatic conference, where proposals were acted on by recorded votes. At the end of the conference, each of the 101 articles received approval by a two-thirds majority, followed by unanimous approval of the final text; *see*, generally, Chapter 1 of this work, *supra*.

[808] These Reports appear in Volumes I-X of UNCITRAL's Annual Reports in conjunction with consideration and action by the Commission, and are included, with indexing and cross-referencing, in Honnold's *Documentary History* (1989), *supra* note 89.

[809] *See* Chapter 4 of this work, *supra*.

substantially the same as the above-quoted provision of 1964 ULIS, with the addition, at the end, of the following:

> ". . . or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law."

A thorough study of the various approaches of the world's legal systems would require a multi-volume treatise prepared by a substantial team of comparative law scholars.[810] The historic differences in approach, between common law and civil law, have been examined thoroughly elsewhere.[811] For our purposes, it is necessary only to ear-mark some of the main differences in approach, which pose special hazards for the unification that CISG is attempting, and to consider and evaluate different approaches to interpretation that ameliorate the danger of diverging interpretations. In civil law systems, judges are required to anchor decisions in a specific article of the particular code. This approach requires creative extensions of the code's provisions by analogy, to meet the multitude of new problems of interpretation and application that arise during the life of that code. The common law approach has been basically different. For example, the Sale of Goods Act (U.K.), the Uniform Sales Act (U.S.) and even the relatively modern Uniform Commercial Code (U.S.) all depend on supplementary support from judge-made common law.

As far as gaps in CISG are concerned, the approach to be adopted is prescribed by Article 7(2) CISG.[812] The main dilemma posed for interpreters is whether they should carry out the gap-filling contemplated according to "the general principles on which [the Convention] is based", or find a solution based on the domestic law "applicable by virtue of the rules of private international law". Although the two methods are not phrased as alternatives in CISG – since Article 7(2) CISG states that recourse to the second may take place only "in the absence of [general] principles" – the present writer has argued that, in the overall context of CISG as uniform law, the two approaches are incompatible with each other.[813]

The differences in these methodological approaches could produce conflicting results in the interpretation of CISG. For judges of the common law tradition, the latter alternative may seem more natural, familiar and consistent with accepted ways of

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[810] *See*, *e.g.*. Schlesinger, *et al.*, (1968), *supra* note 281.

[811] For a fuller development of this background, *see* A.von Mehren and J.Gordley, *The Civil Law System* (Little Brown, Boston, 2nd ed., 1977); Honnold (1987), *supra* note 389, at §§ 96-102. *See* also the discussion on point in Chapter 4 of this work, *supra*.

[812] For a detailed examination of Article 7(2) CISG, *see* Chapter 4 of this work, *supra*.

[813] *See* Chapter 4, *supra*.

dealing with domestic statutes. In addition, and irrespective of jurisprudential heritage, familiar domestic law may be easier to apply – for reasons mentioned in earlier chapters of this work[814] – ultimately leading CISG into the chaotic old world of private international law conflicts, not into the brave new world of uniform laws. The solution to the problem is beguilingly simple and is to be found in the answer to the question that every interpreter of CISG should ask itself: which course is more consistent with CISG's central goal to promote international uniformity? The present writer has submitted that a gap-filling decision that applies by analogy the principles underlying express provisions of CISG, or is based on general principles of international commercial law on which CISG is founded and rests (such as the UNIDROIT Principles) is the only proper interpretation of CISG.[815] Judges and arbiters in other countries will be obliged to consider such interpretative decisions and will thereby contribute to the growing body of applicable international case law further. On the other hand, a decision based on domestic law invoked by the court, by reference to conflict of laws rules, hinders the development of uniformity. Thus, such a decision is not a valid interpretation of CISG and need not be respected in other countries because it is theoretically unsound and practically counter-productive.

As has been argued throughout this work, domestic law does not provide principles that are compatible either with the nature, or with the structure of CISG and the special needs of international trade.[816]

The problems relating to the uneasy co-existence betwen "general principles" and the rules of private international law are due to the compromise inclusion, in Article 7(2) CISG, of the reference to domestic law, albeit as a last resort. The fact that CISG does not explicitly state those general principles[817] has compounded the problem. Some members of the Working Group drafting CISG objected to the general

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[814] For the important role of Universities in international legal education, *see* Chapter 3 of this work, *supra*.

[815] *See* Chapter 4 of this work, *supra*.

[816] *See*, mainly, Chapter 2, *supra*. For academic support of the view favouring analogical extension of the CISG's principles over recourse to domestic law, *see*, *e.g.*, C.M.Bianca and M.J.Bonell (eds.). *Commentary on the International Sales Law* (Guiffré, Milan, 1987) 75-83 (citing other studies). *See also* J.Hellner, "Gap-Filling by Analogy", in *Festskrift till Lars Hjerner, Studies in International Law* (Norstedts, Stockholm, 1990) 219-233; P.Volken, "CISG: Scope, Interpretation and Gap-Filling", in P.Sarcevic and P.Volken (eds.) *Dubrovnik Lectures* (Oceana, NY, 1986) 239-264.

[817] The concept of relying on the general principles of the Convention caused some debate among the members of the Working Group at their first session, in 1970, *see* "Report of the Working Group on

principles approach because "it is difficult or impossible to identify those general principles."[818] Supporters of the retention of the reference to general principles argued that one of the sources for these principles would be the generalisations that could be made from the various specific provisions of the text;[819] another source would be the "course of evolution of the Law."[820] The purpose is to provide the judge with some guidance, rather than "to leave the matter in complete uncertainty," which could result in judges being "free to apply national law whenever a question [was] not expressly settled by the Uniform Law."[821] Otherwise, it would be "an *invitation* to disregard [the Convention] for those who would wish to avoid its application."[822]

While CISG does not list the general principles on which it is based, it is possible to discern a number of those principles from the text of CISG and from its legislative history.[823] In identifying these general principles, it should be kept in mind that CISG's overall objective is to promote international trade by removing legal barriers that arise from different social, economic, and legal systems of the world.[824] The general principles provision can have the narrow effect of guarding against the use of local (and divergent) legal concepts in construing the specific provisions, or the broader effect of authorizing tribunals to create new rules not directly based on the textual provisions. The immediate purpose in identifying and extracting many of the general principles is to help produce at least the narrow effect of preventing interpretations of CISG based on domestic law. The broader effect of creating a *jus commune*[825] might take place on these foundations in the distant future.

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the International Sale of Goods", 1st Sess., ¶¶ 56-72, [U.N. Doc. A/CN.9/35 (1970)], *reprinted in* Honnold's *Documentary History* (1989), *supra* note 89, at 19-21.

[818] *Ibid.*, at ¶ 57, *reprinted in* Honnold's *Documentary History* (1989), *supra* note 89, at 20.

[819] "The general principles . . . are the general ideas which inspired the Uniform Law." *Ibid.*

[820] "Report of the Working Group on the International Sale of Goods", 2d Sess., ¶ 132 [U.N. Doc. A/CN.9/52 (1971)], *reprinted in* Honnold's *Documentary History* (1989), *supra* note 89, at 68.

[821] *Ibid.*

[822] "Report of the Working Group on the International Sale of Goods", 1st Sess., ¶ 69 [U.N. Doc. A/CN.9/35 (1970)], *reprinted in* Honnold's *Documentary History* (1989), *supra* note 89, at 21 (emphasis added).

[823] In debates over the drafting of CISG, some delegates pointed out that the general principles of ULIS are apparent in the provisions of ULIS and its legislative history. *Ibid.*, at ¶ 59, *reprinted in* Honnold's *Documentary History* (1989), *supra* note 89, at 21.

[824] *See* the Preamble to CISG. For an identification of general principles of CISG, *see* Chapter 4 of this work, *supra.*

[825] Black's *Law Dictionary* (6th ed., 1990), at 859, defines *Jus commune* as follows: "[i]n the Civil law, common right; the common and natural rule of right.". This contrasts with *jus singulare*, "a peculiar or individual rule . . . established for some special reason." *Ibid.*, at 862-63.

While many general principles of CISG can be extracted from the text alone, several courts have stated, without engaging in much analysis, that there are no general principles addressing a specific issue.[826] Also, at least one commentator has argued that Article 7(2) CISG

> "... admits the possibility that there actually are [no] general principles underlying the Convention, or at least that the principles are not comprehensive."[827]

Both of these readings take an unjustifiably narrow view of the nature and role of CISG. The Convention was drafted in an atmosphere of compromise to find a reasonably workable solution and is not meant to be an exhaustive codification of international commercial behaviour. Such codification would have been unrealistic and would make CISG too inflexible to adapt to changing circumstances in international trade.

It has been suggested that one should exercise restraint in extracting the general principles. Professor Honnold recommends that such findings of general principles should be limited to situations where the general principles are "moored to premises that underlie specific provisions of the Convention."[828] He further suggests that finding general principles to solve a specific problem is valid only when the lack of a specific provision to govern the issue is due to deliberate rejection by the delegates to the Convention or due to the Convention's "failure to anticipate and resolve [the] issue."[829] If CISG failed to anticipate, or provide for, a specific solution to an issue, an analogical extension from the existing provisions to the new situation is then appropriate.[830] Thus, any issue that has not been expressly excluded by CISG,[831] and which can be resolved by applying the general principles of CISG, should be solved accordingly. A faithful application of Article 7 CISG requires this approach. Such faithful application is required of judges applying CISG. Without this safety net of

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[826] *See* the discussion on the issue of interest rates, earlier in this chapter, *supra*.
[827] Kastely (1988), *supra* note 118, at 606.
[828] Honnold (1991), *supra* note 53, at 155.
[829] *Ibid.* "The language of Article 7(2) reflects the decision to narrow the scope of ULIS 17 . . . which authorized tribunals to find (or create) general principles to settle every problem that is not governed expressly by the Convention." *Ibid.*
[830] *Ibid.*
[831] For example, on the issue of interest rates, various alternatives were discussed at the Vienna Convention, including assigning the interest rate at the seller's place, or at the buyer's place, or the higher of either place. The "prevailing" rate could be either the statutory rate, or the commercial short term discount rate. Some delegates favoured adding a penalty of one percent to whatever the rate to be agreed upon. Other suggestions were to tie the rate to the currency of payment, or base it on

general principles,[832] the rules of interpretation become simple: apply the domestic law whenever CISG has not expressly provided for the resolution of an issue. Such a simple solution would severely undercut the effectiveness of CISG because many issues of practical importance to international trade have not been expressly resolved by CISG, even though they were discussed.[833]

A review of the recent international case law indicates that many tribunals have failed to follow the advocated approach and have thus contributed to inconsistent results. A German tribunal rejected outright the approach based on general principles and argued that even when CISG was still only in the preparatory stages the delegates could not agree on a uniform solution.[834] Some courts display the intent to follow Article 7 CISG, but do not pay sufficient attention to the general principles. For instance, they simply state that CISG has no general principles that are applicable.[835] This approach of following domestic law has led to lack of uniformity on the issue of the interest rate to be paid to the wronged party. For example, in Delchi Carrier S.p.A. v. Rotorex Corp.,[836] the United States district court stated that since Article 78 of CISG does not specify the interest rate, the rate should be fixed in the court's "discretion" and granted the rate of the United States Treasury Bill.[837] A German court determined that the interest rate is the *average* bank lending rate at the creditor's place of business.[838] In another variation, an arbitral tribunal held that the rate awarded was an international trade rate known as LIBOR (London International Bank Offered Rate) that is commonly used with Eurodollars, the currency in which payment was to be made.[839] While this last approach may have the virtue of creating

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international markets. The issue remained unresolved throughout the Convention and the final text emerged without any solution.

[832] *See* Honnold (1991), *supra* note 53, at 155.

[833] A prime example is the payment of prejudgment interest, where the Convention has discussed but has not expressly provided for a method of determining the interest rate.

[834] *Landgericht Aachen*, Case 41 O 111/95 (Italy v. F.R.G.) (July 20, 1995) (abstract, unpublished), available *in* UNILEX. The Court rejected the opinion according to which the interest rate, in order to achieve a uniform international regulation, shall be determined in accordance with the general principles on which CISG is based: as a matter of fact even when CISG was still only in the preparatory stage it had not been possible to reach a uniform solution to this problem.

[835] *E.g.*, on the issue of interest rate, courts often remark that "the general principles do not settle the matter"; *see* Arbitral Award 7565 (Neth. v. U.S.), *ICC Ct. Arb.* (1994), 6 *ICC Ct. Arb. Bull.* 64 (also available *in* UNILEX).

[836] Delchi Carrier S.p.A. v. Rotorex Corp., 71 F.3d 1024 (2d Cir. 1995).

[837] For a more detailed analysis of the Delchi case, *see* the relevant discussion earlier in this chapter, *supra*.

[838] *Landgericht Aachen*, Case 41 O 198/89, (Italy v. F.R.G.) (Apr. 3, 1990), in *Recht der Internationalen Wirtschaft* (1990) 491, (also *available in* UNILEX).

[839] *ICC Ct. Arb.*, Arbitral Award 6653, (Fr. v. Syria), (Feb. 7, 1993), *available in* UNILEX.

uniformity in the Convention's application, it may fail to fulfill CISG's general principle of full compensation.[840]

Although many courts have misunderstood, or have misapplied, the Article 7 CISG mandate on the function of general principles, a few courts have respected it. For example, there are courts that have recognised the general principle of full compensation and applied it properly.[841] In Arbitral Award SCH-4318 [F.R.G. v Aus. (June 15, 1994, Austria)], the arbitrator stated that merchants resort to bank credit when payment from the other party is delayed. Thus the party (the buyer in this case) should be compensated for the interest rate in his place of business with respect to the currency of payment, which was agreed upon as U.S. dollars. The arbitrator also noted that the UNIDROIT Principles of International Commercial Contracts suggest the same solution.[842] This reasoning was also followed in another arbitral award from Austria.[843]

If the situation ever arose that there is an "absence of [applicable general] principles", CISG still provides an important alternative to domestic law. Article 9 CISG provides that parties are bound not only "by practices they have established between themselves", but also by international trade usages. Established practices between the contracting parties and international trade usages can not only supplement CISG but also, in case of conflict, supersede CISG's provisions.[844]

(d) International case law and uniformity

(i) General remarks

There is strong academic support for the present writer's thesis[845] that the reference in Article 7(1) CISG to the obligation to have regard to the CISG's international

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[840] It should be remembered, however, that had the currency of payment not been Eurodollars, this approach might not be desirable. Such an approach of tying the interest rate to an international index may be inapplicable to the plaintiff's actual loss. This solution was rejected by the delegates; *see* Honnold (1989), *supra* note 89, at 759 (remarks of Mr. Dabin, Belgium).

[841] *See*, generally, Arbitral Award SCH-4318 (F.R.G. v Aus.), *Internationales Schiedsgericht der Bundeskammer der Gewerblichen Wirtschaft*, Wien (June 15, 1994), reprinted in *Recht der Internationalen Wirtschaft* (1994) 591-92, *available in* UNILEX; *supra* note 604.

[842] *Ibid.* The reference to the UNIDROIT Principles relates to another important issue raised in the present writer's thesis – the call for the use of the UNIDROIT Principles in Article 7(2) CISG as the "general principles" upon which CISG is based; *see* discussion in Chapter 4 and in current chapter. *supra*.

[843] Arbitral Award SCH-4366 (Aus. v. F.R.G.), *Internationales Schiedsgericht der Bundeskammer der Gewerblichen Wirtschaft*, Wien (June 15, 1994), reprinted in *Recht der Internationalen Wirtschaft* (1994) 590-91, *available in* UNILEX. *See* also, *A Comprehensive and "Intelligent" Data Base on the UN Convention on Contracts for the International Sale of Goods (CISG)*, (Transnational Juris Publications, Inc., Irvington, N.Y. 1996) [also known as "UNILEX", *supra* note 692].

[844] Under the combined effect of Articles 6 and 9(2) CISG.

[845] *See* Chapter 3, *supra*.

character, demands that one should have recourse neither to domestic concepts,[846] nor to domestic interpretive techniques[847] in interpreting the CISG.[848] Similar affirmations can now be found in several recent European court decisions.[849] In a recent Swiss case, the court expressly stated that a uniform interpretation of the CISG required one to take into account its international character and interpret it autonomously and not in light of any domestic law.[850] The German Supreme Court has concurred in this approach, by stating that generally it did not matter whether there were differences between the domestic law and the CISG, since one was not allowed to interpret the CISG in light of domestic law anyway.[851] This affirms the position that CISG, in view of its international character and in line with its goal of uniformity, has to be interpreted autonomously.

There is also strong academic support also for the present writer's opinion[852] that even where the expressions employed by the CISG are textually the same as expressions[853] that have a specific meaning within a particular legal system, they must be interpreted autonomously.[854] Such expressions have to be considered to be independent[855] and different[856] from domestic concepts,[857] since the expressions employed by uniform law Conventions, such as the CISG, are intended to be neutral in order to receive wider acceptance.[858] Indeed, as has been noted earlier in this

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[846] *See* F.Ferrari, "The Relationship Between the UCC and the CISG and the Construction of Uniform Law", 29 *Loy. L.A. L. Rev.* (1996) 1021 (using several concrete examples to illustrate the negative consequences that can arise from the use of domestic concepts).

[847] *See, e.g.*, Bonell (1987), *supra* note 113, at 72-73: "To have regard to the 'international character' of the Convention means first of all to avoid relying on the rules and techniques traditionally followed in interpreting ordinary domestic legislation."

[848] *See* Ferrari (1994), *supra* note 39, at 202.

[849] *See also* Delchi Carrier SpA v. Rotorex Corp., 71 F.3d 1024, 1028 (2d Cir. 1995), a recent American case in which the court referred to the need to interpret the CISG in light of its international character, although it eventually failed to do so; critically analysed earlier in this chapter.

[850] *See* Gerichtspräsident von Laufen (May 7, 1993), *reprinted in* Unilex; *see also Schweizerische Zeitschrift für internationales und europäisches Recht* (1993) (abstract).

[851] *Cf.* BGH, April 3, 1996; *Neue Juristische Wochenschrift* (1996) 2364.

[852] *See* Chapter 2, *supra*.

[853] Some examples of expressions that are textually the same are: "avoidance", "reasonable", "good faith" and "trade usages".

[854] This is generally true for any uniform law Convention. For a discussion on the issue of how to interpret uniform law Conventions other than the CISG, *see generally* S.Bariatti, *L'interpretazione delle convenzioni internazionali di diritto uniforme* (1986); and B.W.M.Trompenaars, *Pluriforme unificatie en uniforme interpretatie - in het buzonder de budrage van UNCITRAL aan de internationale unificatie van het privaatrecht* (1989).

[855] *See, e.g.*, Herber & Czerwenka (1991), *supra* note 531, at 47.

[856] *See* Ferrari (1996), *supra* note 846, at 1026.

[857] *See* the discussion of this point in Chapters 2 and 3, *supra*.

[858] *See* Bonell (1987), *supra* note 113, at 74: "When drafting the single provisions these experts had to find sufficiently neutral language on which they could reach a common understanding."

work,[859] any choice of one expression rather than another is the result of a compromise[860] and does not correspond to the reception of a concept peculiar to a specific domestic law.[861]

(ii) Theoretical issues

The last step towards uniformity can only be taken at the stage of actual interpretation and application of CISG's provisions by the courts. The importance of international case law is two-fold. Firstly, the existence (and the volume) of case law will provide the definitive indication as to whether CISG has been accepted by traders as the law that governs international sales. Secondly, the quality of the case law will determine whether the call for interpretation "to promote uniformity in [the Convention's] application" – a mandate that clearly calls for due regard for interpretations in other countries – is paid the reverence it demands.

In order to reduce the danger of divergent interpretations by courts of different countries,[862] the drafters of CISG[863] inserted Article 7(1) in its text, which states that when interpreting the CISG "regard is to be had to its international character and to the need to promote uniformity in its application." Drafters of other uniform law Conventions have taken a similar approach to the concern about conflicting interpretations.[864] As has been argued in earlier chapters of this work,[865] this means,

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[859] *See*, generally, Chapters 2, 3 and 4 of this work, *supra*.

[860] *See* F.Diedrich, "Maintaining Uniformity in International Uniform Law via Autonomous Interpretation: Software Contracts and the CISG", 8 *Pace Int'l L. Rev.* (1996) 303, at 310: "The [entire] text of the CISG consists of unique, *supra*national collective terms formed out of compromises between state delegates based on several systems of laws." For references to the provisions of the CISG that result in a compromise, *see, e.g.*, E.Diederichsen, "Commentary to Journal of Law & Commerce Case I, Oberlandesgericht Frankfurt am Main", 14 *J.L. & Com.* (1995) 177; Ferrari (1994), *supra* note 39, at 201; P.Koneru, "The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles, 6 *Minn. J. Global Trade* (1997) 105; and Selden (1995), *supra* note 680, at 121.

[861] *See* Enderlein *et al.*, (1991), *supra* note 450, at 61; Herber (1990), *supra* note 537, at 94. However, one commentator has argued that not all expressions found in CISG are to be interpreted autonomously: Ferrari (1999), *supra* note 706, (also available in the Pace Law School website: http://www.cisg.law.pace.edu/index.html), where the author argues that one example of such an expression is "private international law" and concludes that where the CISG makes reference to "private international law", it refers to a "domestic" concept of private international law, *i.e.*, the private international law of the forum.

[862] It has often been stated that it is only possible to reduce the danger of diverging interpretations, it is not possible to eliminate them as such. *See, e.g.*, Lookofsky (1989), *supra* note 730, at 294.

[863] Many abbreviations have been used for the United Nations Convention on Contracts for the International Sale of Goods; for a court decision which lists several of them, *see* OLG Frankfurt, (April 20, 1994), *Recht der Internationalen Wirtschaft* (1994) 593. For a discussion in legal writing of the various abbreviations, *see* A.Flessner & T.Kadner, "CISG? Zur Suche nach einer Abkürzung für das Wiener Übereinkommen über Verträge über den internationalen Warenkauf", in *Zeitschrift für Europäisches Privatrecht* (1995) 347.

[864] *See, e.g.*, Article 18 of the European Economic Community Convention on the Law Applicable to Contractual Obligations (*reprinted in* 19 *I.L.M.* (1980) 1492, at 1496); Article 4 of the UNIDROIT

above all, that one should not read the provisions of CISG through the lenses of domestic law,[866] but in an autonomous manner.[867] Thus, when interpreting the CISG one should not resort to the meaning generally attached to certain expressions within the ambit of a particular legal system.[868]

However, it has often been stated in legal writing that in view of "the need to promote uniformity in [the CISG's] application", it is insufficient to consider the CISG an "autonomous body of rules",[869] and therefore, it is necessary to consider the practice of other jurisdictions.[870] In effect, recourse to decisions rendered by foreign judicial bodies has been advocated,[871] as an extra measure aimed at achieving the CISG's ultimate goal of uniform application.[872] The present writer wants to dispel any impression that may have been created by these comments – *i.e.*, that the practice of consulting foreign jurisprudence is independent from, or additional to, an autonomous approach to CISG's interpretation. An argument to the effect that an autonomous interpretation of CISG and the practice of consulting foreign jurisprudence are separate from each other, or even mutually exclusive, lacks

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Convention on International Factoring (*reprinted in* 27 *I.L.M.* (1988) 922, at 945-46); Article 6 of the UNIDROIT Convention on International Financial Leasing (*reprinted in* 27 *I.L.M.* (1988) 922, at 933-34).

[865] *See*, especially, Chapter 3, *supra*. Many legal writers have written papers on the interpretation of the CISG, which support the thesis of the present writer on this point. *See, e.g.*, M.J.Bonell, "L'interpretazione del diritto uniforme alla luce dell'art. 7 della convenzione di Vienna sulla vendita internazionale", in 2 *Rivista di diritto civile* (1986) 221; F.Ferrari, "Interprétation uniforme de la Convention de 1980 sur la vente internationale", in *Revue internationale de droit comparé* (1996) 813; J.A.Goddard, "Reglas de interpretacion de la Convencion sobre Compraventa Internacional de Mercaderias", in *Revista de investigaciones juridicas* (1990) 9; M.P. Perales Viscasillas, "Una aproximacion al articulo 7 de la Convencion de Viena de 1980 sobre compraventa internacional de mercaderias", 16 *Quadernos de derecho y comercio* (1995) 55; Cook (1988), *supra* note 347.

[866] *See* Honnold (1988), *supra* note 351, at 208: "One threat to international uniformity in interpretation is a natural tendency to read the international text through the lenses of domestic law." *See also* A.Babiak, Comment, "Defining 'Fundamental Breach' Under the United Nations Convention on Contracts for the International Sale of Goods", 6 *Temp. Int'l & Comp. L.J.* (1992) 113, at 117: "[I]nterpretations based on domestic law should be avoided."

[867] *See, e.g.*, Audit (1990), *supra* note 329, at 47; M.J.Bonell, "Commento all'art. 7 della Convenzione di Vienna", in *Nuove Leggi civili commentate* (1989) 21; Diedrich (1996), *supra* note 860.

[868] *See* Honnold (1991), *supra* note 53, at 136 (stating that "the reading of a legal text in the light of the concepts of our domestic legal system [is] an approach that would violate the requirement that the Convention be interpreted with regard to its 'international character'.").

[869] *Contra* Bonell (1987), *supra* note 113, at 74: "[T]o have regard to the 'international character' of the Convention also implies the necessity of interpreting its terms and concepts autonomously."

[870] *See* Herber (1995), *supra* note 231, at 94; P.Winship, "Changing Contract Practices in the Light of the United Nations Sales Convention: A Guide For Practitioners", 29 *Int'l Law.* (1995) 525, at 528; Maskow (1981), *supra* note 359, at 39.

[871] *See, e.g.*, Darkey (1995), *supra* note 706, at 142; Hartnell, *supra* note 572, at 7.

[872] It has often been pointed out that the CISG's ultimate goal is uniformity. *See, e.g.*, S.A.Malloy, Note, "The Inter-American Convention on the Law Applicable to International Contracts: Another Piece of the Puzzle of the Law Applicable to International Contracts", 19 *Fordham Int'l L.J.* (1995) 662, at 667, fn.17.

validity. It is submitted that any ostensible difference between the two practices is based on a misguided appreciation of the "autonomy" with which CISG must be interpreted. It is submitted that an autonomous approach, in the context of the present discussion on CISG's interpretation and application, cannot be conceived separately from the practice of referring to foreign case law; in fact, it demands such a practice and relies on it. CISG is an autonomous body of law, in the sense that it is not derived from a specific, pre-existent legal system. As its Preamble states, it is the result of the "establishment of a New International Economic Order." In addition, as was explained in earlier chapters of this work,[873] CISG's legislative history reveals the independence of its origins and nature; a fact further supported by the linguistic analysis contained in this work. As such, CISG's interpretation must be autonomous, *i.e.*, not based on any established domestic approach. This point is vital for CISG's legitimacy as a truly international (or, supra-national) instrument. On the other hand, the reference to CISG's foreign jurisprudence by domestic courts has been advocated by the present writer as a necessary element in maintaining the uniformity of CISG's autonomy and internationality.[874] In this sense, CISG's interpretation will remain autonomous only as long as foreign jurisprudence is used. Far from being distinct, or even irreconcilable, the two approaches are complementary and form two indispensable parts of the same whole. In the context of CISG's internationality, the two concepts are merely two elements of the same approach and should not be treated as separate practices.

(iii) Practical, substantive and methodological issues

Moving on from the above theoretical digression, it is noted that a number of legal writers[875] have suggested recourse to the aforementioned guidelines to avoid divergent interpretations and applications of CISG.[876]

According to the present writer, uniformity can only be achieved if one also considers foreign case law.[877] The interpreter must consider decisions rendered by

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[873] *See*, especially, Chapter 2, *supra*. The autonomous nature of CISG is also discussed in Chapters 3 and 4, *supra*, which trace the legislative history of Articles 7(1) and 7(2) CISG respectively.

[874] *See* Chapter 4, *supra*.

[875] *See* F.Ferrari, "Uniform Interpretation of the 1980 Uniform Sales Law", in *Essays in European Law and Israel* 511 (Alfredo Mordechai Rabello *ed.*, 1997); Goddard (1990), *supra* note 865, at 103; T.V.Lepinette, "The Interpretation of the 1980 Vienna Convention on International Sales", *Diritto del commercio internazionale* (1995) 377; Rosenberg (1992), *supra* note 493.

[876] One of the risks that result from diverging interpretations of CISG is forum shopping. *See, e.g.*, Honnold (1991), *supra* note 53, at 142: "The settlement of disputes would be complicated and litigants would be encouraged to engage in forum shopping if the courts of different countries persist in divergent interpretations of the Convention."

judicial bodies of foreign jurisdictions,[878] because it is possible that the same, or similar, questions have already been examined by other States' courts.[879]

Practical issues

Requiring interpreters to consider foreign decisions creates practical difficulties, for two main reasons. Firstly, there is the issue of access to foreign case law and, secondly, the fact that case law is often written in a language unknown to the interpreter.[880] These reasons must be partly responsible for the fact that, while many decisions exist which refer to decisions from judicial bodies of the same country,[881] there is only one decision in which detailed reference is made to decisions rendered by foreign judicial bodies. In that case, an Italian court[882] had to decide whether a notice of non-conformity, given to the seller after delivery of non-conforming goods, was timely or not. In deciding this issue, the Italian court referred to a Swiss case,[883] rendered in Italian (which may have been the reason why this case was quoted), and to a German case[884] that had decided an analogous matter. Even though there are hundreds of cases on CISG,[885] this appears to be the only one in which a court has referred to decisions from foreign jurisdictions to validate their argument.

This state of affairs demonstrates the effect of these practical difficulties on the uniform application of the CISG. However, this cannot be said to be entirely attributable to a lack of supporting structures. The world-wide efforts to create easily accessible channels of information on CISG and its case law were documented

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[877] Also *see* E.H.Patterson, "United Nations Convention on Contracts for the International Sale of Goods: Unification and the Tension Between Compromise and Domination", 22 *Stan. J. Int'l L.* (1986) 263, at 283.

[878] *See* Cook (1997), *supra* note 690, at 261.

[879] *See* Reinhart (1991), *supra* note 559, at 30.

[880] Some commentators have argued that the interpreters of CISG are not only the judges, but the contracting parties as well. *See, e.g.*, Enderlein & Maskow (1992), supra note 331, at 55: "To have regard to the *international character* of the Convention means, above all, not to proceed in interpreting it from national juridical constructions and terms . . . *This does not only refer to judges but also to the parties which in settling their differences of opinion first and foremost have to interpret the applicable rules.*" (second emphasis added).

[881] For court decisions quoting prior CISG case law rendered by tribunals of the same country, *see, e.g.*, *OLG Düsseldorf*, July 11, 1996, *Recht der internationalen Wirtschaft* (1996) 958; *LG Kassel*, June 22, 1995, UNILEX; *OLG Hamm*, February 8, 1995, *Praxis des internationalen Privat-und Verfahrensrechts* (1996) 197; *OLG Koblenz*, September 17, 1993, *Recht der internationalen Wirtschaft* (1994) 934; *OLG Oldenburg*, November 9, 1994, *Neue Juristische Wochenschrift Rechtsprechungs-Report* (1995) 438.

[882] *Tribunale Cuneo*, January 31, 1996, UNILEX.

[883] *Ibid.*, quoting Pretura Locarno-Campagna, April 27, 1992, *reprinted* in *Schweizerische Zeitschrift für internationales und europäisches Recht* (1993) 665.

[884] *Ibid.*, quoting *LG Stuttgart*, August 31, 1988, *reprinted* in *Praxis des internationalen Privat-und Verfahrensrechts* (1990) 317.

[885] For a list of over 550 cases, *see* Will (1999), *supra* note 407.

earlier in this work.[886] Although no international tribunal exists with jurisdiction to review the case law generated by CISG decisions – nor is there significant support for establishing such a tribunal, *inter alia*, because of the time delays and logistical problems associated with such a proposal – uniformity need not necessarily suffer.[887] The existence of a hierarchically structured international judicial system dealing with CISG could not on its own guarantee uniformity. The general experience from our own legal systems supports this point. On the other hand, the lack of such an international structure does not necessarily spell the end of uniformity. The present writer is not aware of any scholarly comment to the effect that the United States Supreme Court's lack of jurisdiction to correct conflicting interpretations of the many uniform laws of that country's 50 States – *e.g.*, the U.C.C. – has seriously impeded the application of those laws.

It is submitted that the key to achieving uniformity in CISG's case law is a strongly-shared conviction among national courts of the need to preserve CISG's uniformity by giving weight to decisions in other States, not the existence of an international CISG Supreme Court. Indeed, a carefully considered decision to differ from decisions in other States probably provides a healthy opportunity for reconsideration of doubtful decisions – an integral service in CISG's long-term development.[888] Therefore, what must be advocated in tribunals interpreting and applying CISG is the idea that all involved in this task are colleagues of a world-wide body of jurists with a common goal. To this end, a lot of effort has been invested to provide world-wide access to decisions applying CISG.[889]

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[886] *See* Chapter 3, *supra*, where the creation of CLOUT, UNILEX and university databases is discussed.

[887] For a discussion of proposals for the establishment of an international tribunal with jurisdiction over CISG, *see* Chapter 3, *supra*. This issue arose under the 1964 Hague Conventions as well. For a discussion of this issue, *see* Graveson (1968), *supra* note 51, at 12, where the author states that, "[a]llowing for the necessary and inevitable divergence of human decision, a problem still remains of ensuring that any tendencies towards divergence in the application of uniform laws shall be corrected at appropriate times and in suitable ways. How then shall continuing uniformity be ensured? *Shall it be done by giving ultimate jurisdiction to an international court,* such as the International Court of Justice?" (emphasis added). *Cf.* Bonell (1987), supra note 113, at 89: "[A] similar solution can hardly be conceived with respect to [the Vienna Sales] Convention. This Convention, like other international conventions elaborated under the auspices of the United Nations or other international organizations, . . . is intended to receive a world-wide acceptance. To expect that all adhering States, notwithstanding their different social, political and legal structure, could even agree on conferring to an international tribunal the exclusive competence to resolve divergences between the national jurisdictions in the interpretation of the uniform rules, would be entirely unrealistic."

[888] Especially if one bears in mind that CISG can be amended only by agreement between the Contracting States in an another diplomatic conference, which is a rare event in itself.

[889] For a discussion of these efforts, including the establishment of CLOUT and various university databases and websites, *see* Chapters 3 and 4, *supra*.

However, the problem that remains is a municipal judge's ability to understand and deal with international case law.[890] The risk with respect to foreign decisions in the field of uniform law is that judges may find it easier to follow the interpretation of a uniform international law provision given by the courts of their own State, than that prevailing in another Contracting State. The present writer is of the opinion that the main problem here is associated not with the access to foreign case law, but with the interpreters' unwillingness, conscious and subconscious, to apply it.

The unwillingness of some judges to consider foreign jurisprudence is often due to mistrust and an uneasy awareness of their lack of familiarity with foreign systems of law. The common preference of judges for the law of their own country might be explained by a sincere recognition of their not having been trained to cope with foreign law. [891] Since the relevant access structures have been established, the conclusion must be drawn that it is the interpreters' state of mind that must change. In assessing interpretations of uniform laws in other countries, courts could receive further valuable assistance from the principle espoused in some civil law countries that the writings of leading scholars *(doctrine)* have more weight than court decisions. The extent to which this principle reflects current practice may vary, but in situations where it is important to the weight of international authority one should not neglect available writings of scholars familiar with other legal systems.[892]

Confronting international uniform law may seem strange and daunting to national courts, but it need not be. The work done world-wide on producing guides that assist in finding and classifying the ever-increasing number of doctrinal writings on CISG should prove extremely helpful in this respect. However, an interpreter of CISG must first overcome his own inhibitions and then focus sincerely on the international character of the instrument to be interpreted, if uniformity is to be achieved.

Substantive issues

The knowledge of foreign case law, however, does not solve all of the CISG's substantive and interpretive problems. Notwithstanding the present writer's argument in favour of considering foreign jurisprudence, it must be noted that, although the

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[890] For an expansive discussion of this problem, *see* Chapter 3, *supra*.
[891] For a discussion of this problem and suggestions for its solution, *see* Chapter 3, *supra*.
[892] *See* Honnold (1987), *supra* note 389, at 127. On the weight that common law jurisdictions give to domestic scholarly writing and to court decisions in civil law jurisdictions, *see* Honnold (1987), *ibid.*, at 123-126. *See also* R.Schlesinger, H.Baade, M.Damaska & P.Herzog, *Comparative Law* (Foundation Press, Westbury, NY, 1988) 597-656, especially the note at 643.

knowledge of foreign case law is necessary, it is not sufficient to solve all the substantive issues that can arise in CISG's interpretation.[893]

The knowledge of foreign case law cannot *per se* suffice to avoid divergent interpretations of CISG and, thus, guarantee uniformity.[894] Applying the analogy of a domestic legal system that does not espouse the doctrine of *stare decisis* supports this point. Knowledge of domestic case law in that situation does not exclude divergent interpretations in the courts of that system.

Furthermore, if the knowledge of foreign case law were actually sufficient to create uniformity in the interpretation and application of CISG, this would mean, taken to an extreme, that the first position taken on a specific issue by any court would be the one shaping all the subsequent CISG case law. This can hardly be true because, at best, it would deprive CISG's interpretation of any future development and, at worst, it could foster the perpetuation of precedents on account of temporal, rather than, juridical merit.

Methodological issues

The main methodological problem created by the practice of considering foreign case law concerns the degree of authority to be attached to it. In essence, the question here is whether foreign case law should be treated as having binding force, or merely persuasive value.

There is a difference in academic opinion on this issue. According to Professor Bonell, foreign case law should have the value of precedent "[i]f there is already a body of international case law."[895] Another author even speaks of a "supranational *stare decisis*"[896] which can be achieved if "common law and civil law judges . . .

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[893] For some recent papers discussing judicial applications of the CISG in different countries, *see* Bonell & Liguori (1996), *supra* note 401; Bonell & Liguori (1997), *supra* note 687; Callaghan (1995), *supra* note 406; L.F.Del Duca & P.Del Duca, "Practice Under the Convention on International Sale of Goods (CISG); A Primer for Attorneys and International Traders", 27 *UCC L.J.* (1995) 331 (part I), 29 *UCC L.J.* (1996) 99 (part II); Ferrari (1995), *supra* note 739; H.M.Flechtner, "More U.S. Decisions on the U.N. Sales Convention: Scope, Parol Evidence, 'Validity' and Reduction of Price Under Article 50", 14 *J.L. & Com.* (1995) 153; Karollus (1995), *supra* note 706; C.Witz, "The First Decision of France's Court of Cassation Applying the UN Convention on Contracts for the International Sale of Goods", 16 *Journal of Law and Commerce* (1997) 345-356.

[894] *See, e.g.*, Ferrari (1999), *supra* note 706; also available in the Pace Law School website: http://www.cisg.law.pace.edu/index.html .

[895] Bonell (1987), *supra* note 113, at 91.

[896] L.A.Dimatteo, "An International Contract Law Formula: The Informality of International Business Transactions Plus the Internationalization of Contract Law Equals Unexpected Contractual Liability". 23 *Syracuse J. Int'l L. & Com.* (1997) 67, at 79.

alter their approaches in a number of ways."[897] This last proposal entails that civil law judges start to "search other cases throughout the world and follow precedent in much the same way the common law judge does within her national system."[898]

Both of the above opinions have been criticised on the following two grounds.[899]

Firstly, it is stated that a uniform body of case law does not *per se* guarantee the correctness of a substantive result.[900]

Secondly, it is asserted that the lack of a necessary hierarchical court structure on an international level that does not allow for the creation of a "supranational *stare decisis*" doctrine.

The present writer argues that although the first criticism is strictly true, it fails to take into account the fact that the proper interpretation of CISG necessarily involves the elements of autonomy and internationality, which the relevant body of uniform law cited to support the criticism had itself failed to take into account. In other words, although uniformity is not sufficient, nevertheless, it remains a necessary element in the proper interpretation of CISG.

As far as the second criticism is concerned, the present writer has already argued that the lack of a rigid hierarchical international court structure cannot, by itself, be blamed for lack of uniformity in CISG's interpretation and application.[901] That is not to say that there are no methodological difficulties in considering and applying foreign case law, but to magnify, or even exaggerate, their importance is counter-productive amidst the current of well-documented international efforts to overcome them.

Without placing unnecessary, strict and minimalist labels on different legal systems, it is necessary that civil law judges start to "approximate their common law

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[897] L.A.Dimatteo, "The CISG and the Presumption of Enforceability: Unintended Contractual Liability in International Business Dealings", 22 *Yale J. Int'l L.* (1997) 111, at 133.

[898] *Ibid.*

[899] *See, e.g.*, Ferrari (1999), *supra* note 706, at 260-261, where the author declares that foreign case law should have merely persuasive power, admitting a change of his previous position in: Ferrari (1994), *supra* note 39, at 204-05, where he had stated that foreign case law can have the value of precedent where there is a uniform trend.

[900] Citing as evidence the criticism towards the large body of CISG case law which has applied the rate of interest of the domestic law designated by the rules of private international law of the forum, *see: AG Augsburg*, January 29, 1996, UNILEX; *Tribunal Civil de la Gane*, May 20, 1996, UNILEX; *LG München*, January 25, 1996, UNILEX; *HG St. Gallen*, December 5, 1995, in *Schweizerische Zeitschrift für internatioanles und europäisches Recht* (1996) 53; *AG Tessin*, February 12, 1996, *in Schweizerische Zeitschrift für internationales und europäisches Recht* (1996) 135; *ICC Court of Arbitration*, Arbitral Award 8611, UNILEX.

[901] *See* Chapter 3, *supra*.

counterparts in increasing their reliance on [case law]",[902] as common law judges increasingly take into account legal writing as well as legislative history. Only such a concerted effort can successfully undertake the admittedly Herculean task of unifying international sales law and obtain uniformity in the interpretation and application of the supra-national animal that is CISG. The importance of the task should arouse the interpreters, not send them into hiding behind the safety borders of the familiar. For these reasons, the present writer believes that, if a domestic court took its international duties and responsibilities seriously when interpreting CISG (as these have been expounded throughout this work), we would not need to struggle with the difficulties of formally establishing a strict doctrine of *stare decisis*. Precedent, in its orthodox sense, cannot exist without a unifying court structure. There is no doubt that foreign case law should have, at least, influential or persuasive value. This result is, in essence, what Article 7(1) CISG imposes when it provides that "*regard is to be had* . . . to the need to promote uniformity in its application." Foreign case law should be used, at least, as a source from which to draw either arguments or counter-arguments in interpreting CISG. Thus, it can be helpful in solving a specific problem.[903] It is hoped that once courts shed their national limitations and immerse themselves into the spirit of CISG, common sense should be able to guide the degree of compliance to foreign case law and draw the parameters for the exact extent of its use. After all, it was common sense and optimism that drove CISG's drafters and these are values that everybody's CISG education should contain. What matters most, in the short term, is that domestic courts are initiated in the engagement of the international discourse that CISG envisages and to do so in the liberal fashion that characterises the interpretation process itself. This should not be seen as undercutting uniformity and predictability of outcomes, but as implementing the interpretation of CISG on its proper basis. This is a necessary step for the establishment, in the long term, of substantive predictability and uniformity. Of course, it remains to be seen whether CISG can survive this necessary *period of grace*.

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[902] V.G.Curran, "The Interpretive Challenge to Uniformity", 15 *J.L. & Com.* (1995) 175, at 177.

[903] *See* Enderlein & Maskow (1992), *supra* note 331, at 56: "[W]hat matters . . . is not a prejudicial effect of rulings by foreign courts or arbitrational tribunals and not that the decision taken by an organ, which by accident was entrusted first to deal with a specific legal issue, is attached a particularly great

(e) General principles of international law: UNIDROIT Principles

(i) Introduction to gap-filling issues

When the solution to a gap-filling problem can not be achieved by analogical application of a rule found in a specific CISG provision, gap-filling can be performed by the application of the "general principles" on which CISG is based.[904] This procedure differs from the analogical application method,[905] in that it does not solve the case in question solely by extending specific provisions dealing with analogous cases, but on the basis of rules which because of their general character may be applied on a much wider scale.

The present writer, in Chapter 4, drew a distinction between principles extrapolated from within specific CISG provisions and general principles of international commercial law on which CISG as a whole is founded. This distinction, if accepted as valid, can assist in the elimination of the need to resort to rules of private international law for gap-filling, because it provides the theoretical framework for the introduction of the UNIDROIT Principles as part of the "general principles" on which CISG is based. As was argued in the same place, this development would maintain the integrity of CISG's international and uniform application and interpretation by rendering the resort to the rules of private international law redundant and, eventually, obsolete in that context.

There are two important questions that need to be answered, in connection to this proposal. Firstly, can the UNIDROIT Principles be regarded as a genuine expression of "general principles" of international trade law? Secondly, even if the answer to the first question were positive, is it legitimate to use the UNIDROIT Principles in the proposed way, which would render the express textual reference by CISG to the rules of private international law in Article 7(2) redundant and defunct?

The present writer will explain in the following section why both questions should be answered in the affirmative.

(ii) The UNIDROIT Principles as "general principles"

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importance; rather, the existing material in regard to relevant rulings has to be taken account of when giving the reason for a decision."

[904] *See* Article 7(2) CISG.

[905] For a clear distinction between the two approaches, *see* Kropholler (1975), *supra* note 429, at 292 *et seq.*

The instrument of the UNIDROIT Principles,[906] contrary to CISG, is not intended for adoption as a treaty, or as a uniform law; rather, the document is in the nature of a non-binding "Restatement" of the existing international commercial contract law. The nature and the potential of the function of such a "Restatement" are highlighted in the Preamble of the UNIDROIT Principle, which reads as follows:

> These Principles set forth general rules for international commercial contracts.
>
> They shall be applied when the parties have agreed that their contract be governed by them.
>
> They may be applied when the parties have agreed that their contract be governed by "general principles of law", the "*lex mercatoria*" or the like.
>
> They may provide a solution to an issue raised when it proves impossible to establish the relevant rule of the applicable law.
>
> They may be used to interpret or supplement international uniform law instruments.
>
> They may serve as a model for national and international legislators.

The present writer points to the pervasive influence of the UNIDROIT Principles in international commerce and the widely-held recognition of the UNIDROIT Principles, by international traders, as an expression of "general principles of law", or the *lex mercatoria*.[907] This point offers direct support to the present writer's thesis that the UNIDROIT Principles can play an important role in CISG's interpretation under Article 7(2) CISG by being utilised as an expression of the "general principles" upon which CISG is based and thus rendering the recourse to conflict of laws rules redundant in that context.

Further evidence of the wide acknowledgement that the UNIDROIT Principles reflect general principles of international law is provided by a survey of arbitral awards, which support the potential use of the UNIDROIT Principles in Article 7(2) CISG.[908] In those instances, the UNIDROIT Principles were applied as a means of interpreting the applicable domestic law to demonstrate that a particular solution

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[906] For a detailed discussion of the origins, nature and scope of the UNIDROIT Principles, *see* Chapter 4, *supra*.

[907] *See* Chapter 4, *supra*; Bonell (1997), *supra* note 562.

[908] The awards were rendered by the Court of Arbitration of Berlin and the Court of Arbitration of the International Chamber of Commerce. There is also an unpublished decision of the Court of Appeal of Grenoble to the same effect, *supra* note 565; *see* Chapter 4, *supra*.

provided by the applicable domestic law corresponds to the general principles of law as reflected in the UNIDROIT Principles.[909]

There are even awards in which the UNIDROIT Principles are chosen as the law governing the contract, implicitly considering the UNIDROIT Principles as a source of the *lex mercatoria* and a reflection of wide international consensus.[910]

These results are justified because they are clear acknowledgements of the truly international nature of the Principles, which were produced under the auspices of UNIDROIT with the efforts of many of the same individuals who had been involved for a considerable number of years to produce the CISG and the participation of many legal scholars from a considerable number of countries.

The general perception is that the UNIDROIT Principles have enjoyed a very favourable reception in the international business and legal community.[911]

Furthermore, the UNIDROIT Principles have already had a significant influence on national and international codifications of private law world-wide and among countries of divergent social, legal and cultural modes.[912]

Concluding, it is submitted that UNIDROIT Principles, which have been justifiably greeted as "a significant step forward in the globalisation of legal thinking",[913] should be regarded as a genuine expression of the "general principles" that Article 7(2) CISG refers as an interpretative aid. The UNIDROIT Principles, being regarded as a clear expression of "general principles" of international law, could offer considerable assistance in the interpretation of CISG by clarifying the language of CISG, by filling gaps in CISG and by working with CISG in an expanded role in order to achieve the uniformity of interpretation and application that the drafters of CISG had intended.[914]

(iii) The legitimacy of their use in Article 7(2) CISG

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[909] *See* Chapter 4, *supra*.

[910] Three of these awards have been rendered by the Court of Arbitration of the International Chamber of Commerce. For extensive references, *see* Lalive (1995), *supra* note 566. *See* also, Boele-Woelki (1996), *supra* note 566, at 661, who points out that "[t]his significant award may be regarded as the official entry of the Principles into international arbitration." Another award of this kind was rendered by the National and International Court of Arbitration of Milan, Award No 1795 of 1 December 1996.

[911] *See* Chapter 4, *supra*.

[912] *See* Chapter 4, *supra*.

[913] Perillo (1994), *supra* note 570, at 282.

[914] For a detailed discussion of each of these proposed roles of the UNIDROIT Principles, *see* Chapter 4, *supra*.

On the second question, concerning the legitimacy of the proposed use of the UNIDROIT Principles, which will, if adopted, render the textual reference in Article 7(2) CISG to private international law redundant, the following must be noted. The Preamble to the UNIDROIT Principle endorses that they "may be used to interpret or supplement international uniform law instruments." The use of the UNIDROIT Principles as a means of interpreting international uniform law has already been recognised and exercised. Three awards – two rendered by the International Court of Arbitration of the Federal Chamber of Commerce of Vienna[915] and one by the Court of Arbitration of the International Chamber of Commerce[916] – refer to the UNIDROIT Principles in order to fill a gap in CISG. In addition, there is a court decision rendered by the Court of Appeal of Grenoble, which used the UNIDROIT Principles as a means to supplementing CISG.[917]

It is each judge's, or arbitrator's, task to determine the applicable general principles and to derive the solution for the specific question to be settled from these principles, on a case by case basis. The latter task could be facilitated by resorting to the UNIDROIT Principles. The only condition that needs to be satisfied is to show that the relevant provisions of the UNIDROIT Principles are the expression of a general principle underlying CISG. This point seems to have been missed by a section of scholarly opinion. For instance, one commentator has clearly rejected the idea of resorting to the UNIDROIT Principles in the context of Article 7 CISG.[918]

However, the balance of academic opinion seems to be that Article 7(2) CISG legitimises resorting to the UNIDROIT Principles as a means of interpreting and supplementing CISG – so long as there is a gap in CISG and the relevant provisions of the UNIDROIT Principles are the expression of a general principle underlying CISG and they are not inconsistent with the CISG provision in question.[919]

An argument against the utilisation of the UNIDROIT Principles is that they do not support the goal of reducing unpredictability in trade,[920] and that they indeed have the potential to increase the uncertainty surrounding a business transaction because

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[915] Award No. 4318 and Award No. 4366 of 15 June 1994; *supra* note 604.
[916] *Cf.* ICC Award No. 8128 of 1995, *supra* note 605.
[917] 23 October 1996 (unpublished), *supra* note 611.
[918] *See* Drobnig (1994), *supra* note 597, at 8.
[919] *See*, *e.g.*, Bonell (1996), *supra* note 598; Cazon (1994), *supra* note 598; Enderlein (1994), *supra* note 598.
[920] *See* Hill (1996), *supra* note 612.

several of their provisions "appear to depart from normal trading practices".[921] It has also been argued that arbitrators should not feel free to use the UNIDROIT Principles in conjunction with CISG unless the parties to the contract have explicitly agreed to them, because the Principles are not law and they often diverge from the equivalent provisions of CISG.[922]

However, the significant success encountered by both CISG and the UNIDROIT Principles, as evidenced by their warm reception by many different socio-political cultures and legal systems, demonstrates that they each have their own *raison d'etre*. In addition, the valuable assistance that the UNIDROIT Principles can offer to uniformity, by clarifying the language of CISG and settling matters governed but not expressly settled by CISG, highlights the fact that the two instruments can work together harmoniously. With respect to international commercial transactions different to sales contracts, there is virtually no risk of a clash between the two instruments, given the restricted scope of CISG. Even within the ambit of international contracts of sale, there is, at least at this point, no real competition between the UNIDROIT Principles and CISG. In view of the important function that the UNIDROIT Principles may fulfil in collaboration with CISG, in the roles analysed in Chapter 4 of this thesis, it is arguable that they not only do not threaten CISG's role, or success, but, on the contrary, they seem likely to enhance CISG's value and prestige.

As far as the reference to the rules of private international law in Article 7(2) CISG is concerned, two things must be said. Firstly, it is incorporated into the text of CISG. Secondly, the strength of this textual reference is clearly undermined by an examination of its legislative history. There is strong academic support for the view that in interpreting CISG, in the absence of general principles of the Convention (*i.e.*, as *ultima ratio*[923]) one not only is allowed to make recourse to the rules of private international law, one is obliged to do so.[924] The present writer contends that this conclusion is invalid and that the recourse to the rules of private international law should be rejected. It is part of this thesis that the grounds for such a rejection are

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[921] Hill, *ibid.*, at 169.

[922] *See* H.Raeschke-Kessler (1995), *supra* note 614.

[923] For a similar evaluation, *see* Bonell (1991), *supra* note 624, at 25; Herber (1990), *supra* note 537, at 93.

[924] For a similar conclusion, *see* Ferrari (1994), *supra* note 39, at 228. Bonell (1987), *supra* note 113, at 83, states that the "recourse to domestic law for the purpose of filling gaps under certain circumstances is not only admissible, but even obligatory."

stronger than the reasons for the inclusion of private international law rules in the gap-filling mechanism of CISG. The inclusion of the provision in question was the result of an uneasy drafting compromise generated by political reasons. Its application for gap-filling purposes not only offers nothing to "the development of international trade on the basis of equality and mutual benefit,"[925] but it fosters the creation of divergent interpretations of CISG as well, thus endangering CISG's long-term success and survival. Courts, especially in countries without an established tradition in extrapolating general principles from a codified instrument, can fatally injure CISG's credibility as uniform trans-national law by abusing the "last resort" option.

For these reasons, the question of whether it is legitimate to use the UNIDROIT Principles in the proposed way, which renders the express textual reference by CISG to the rules of private international law in Article 7(2) redundant and defunct, should be answered in the affirmative.

(iv) Final remarks

It is the opinion of the present writer that CISG is – and must remain – a self-contained body of rules, independent of and distinct from the different domestic laws. The nature of the effort that created CISG demands that CISG stand on its own feet, or it will not stand at all. Due to its unique nature and limitations, it is necessary that CISG exist on top of a legal order that can provide doctrinal support and solutions to practical problems – such as gap-filling – in order to guarantee CISG's functional continuity and development without offending its values of internationality and uniformity. The necessary legal backdrop for CISG's existence and application can be provided by general principles of international commercial law, such as those exemplified by the UNIDROIT Principles.

The UNIDROIT Principles and CISG both belong to the "New International Economic Order"[926] that the United Nations has envisaged, and working in tandem they best reflect the objectives of that body to remove "legal barriers in international trade and promote the development of international trade".[927]

On the other hand, the recourse to rules of private international law represents regression into doctrinal fragmentation and practical uncertainty. The relevant

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[925] Preamble to CISG.
[926] *Ibid.*
[927] *Ibid.*

reference to such a method in Article 7(2) CISG is regrettable and should remain inactive, since its activation would reverse the progress achieved by the world wide adoption of CISG as a uniform body of international sales law.

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